Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

ROBERT BEAM RUNYAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1) Can evidence obtained during a private party search that was illegal under state law serve as the sole basis for the independent source exception to the exclusionary rule?

2) Can the intrastate use of the internet alone satisfy the jurisdictional element of interstate commerce in a prosecution involving child pornography?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT	1
CITATION TO THE OPINIONS BELOW	1
STATEMENT OF THE BASIS FOR JURISDICTION	1
CONSTITUTIONAL PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
A. Basis for Federal Review in the First Instance	2
B. Procedural History	3
C. General Statement of Material Facts	4
REASONS FOR GRANTING THE WRIT OF CERTIORARI	7
REASON I	7
IN FINDING THAT INFORMATION DERIVED FROM A PRIVATE PARTY SEARCH THAT WAS ILLEGAL UNDER STATE LAW SUPPORTED APPLICATION OF THE INDEPENDENT SOURCE EXCEPTION TO THE EXCLUSIONARY RULE, THE COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT	7
STATEMENT OF FACTS PERTINENT TO REASON I	7
ARGUMENT AND AUTHORITIES IN SUPPORT OF REASON I	11

TABLE OF CONTENTS – Continued

Page

STATEMENT OF FACTS PERTINENT TO REASON I 7

ARGUMENT AND AUTHORITIES IN SUPPORT OF REASON I 11

A. Background 11

B. The Private Searches Were Illegal Under Texas Law 12

C. Illegal Private Conduct Should Not Serve as the Basis to Excuse Unconstitutional Government Conduct 13

REASON II 18

WHERE THERE WAS NO PROOF OF ACTUAL ACTIVITY IN MORE THAN ONE STATE, AND THE COURT OF APPEALS FOUND THAT SUCH INTRASTATE USE OF THE INTERNET ALONE SATISFIED THE JURISDICTIONAL ELEMENT OF INTERSTATE COMMERCE, THE COURT OF APPEALS FOR THE FIFTH CIRCUIT HAS DECIDED AN IMPORTANT FEDERAL QUESTION THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT 18

REASON III 18

WHERE THERE WAS NO PROOF OF ACTUAL ACTIVITY IN MORE THAN ONE STATE, AND THE COURT OF APPEALS FOUND THAT SUCH INTRASTATE USE OF THE INTERNET ALONE SATISFIED THE JURISDICTIONAL ELEMENT OF INTERSTATE COMMERCE, THE COURT OF APPEALS FOR THE FIFTH CIRCUIT HAS DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH DECISIONS OF OTHER UNITED STATES COURTS OF APPEALS 18

TABLE OF CONTENTS – Continued

Page

STATEMENT OF FACTS PERTINENT TO REASONS II AND III 19

ARGUMENT AND AUTHORITIES IN SUPPORT OF REASONS II AND III 19

A. Novel Question 20

B. Conflict Among the Circuits 21

CONCLUSION AND PRAYER 24

TABLE OF AUTHORITIES

Page

SUPREME COURT CASES

Bush v. Gore, 531 U.S. 98, 121 S. Ct. 525, 148 L. Ed. 2d 388 (2000) 17

Elkins v. United States, 364 U.S. 206, 80 S. Ct. 1453, 4 L. Ed. 2d 1688 (1960) 16

Erie R. Co. v. Tompkins, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938) 17

Murray v. United States, 487 U.S. 533, 108 S. Ct. 2529, 101 L. Ed. 2d 472 (1988) 14, 16

Salve Regina College v. Russell, 499 U.S. 225, 111 S. Ct. 1217, 113 L. Ed. 2d 190 (1991) 17

United States v. Jacobsen, 466 U.S. 109, 104 S. Ct. 1652, 80 L. Ed. 2d 85 (1984) 15

United States v. Lopez, 514 U.S. 549, 115 S. Ct. 1624, 131 L. Ed. 2d 626 (1995) 19

United States v. Payner, 447 U.S. 727, 100 S. Ct. 2439, 65 L. Ed. 2d 468 (1980) 16

Younger v. Harris, 401 U.S. 37, 91 S. Ct. 746, 27 L. Ed. 2d 669 (1971) 17

OTHER FEDERAL CASES

Annulli v. Panikkar, 200 F.3d 189 (3d Cir. 1999) 22

Cofacredit, S.A. v. Windsor Plumbing Supply Co., Inc., 187 F.3d 229 (2d Cir. 1999) 22

Smith v. Ayres, 845 F.2d 1360 (5th Cir. 1988) 23

United States v. Brumley, 59 F.3d 517 (5th Cir. 1995) 23

TABLE OF AUTHORITIES – Continued

Page

United States v. Bryant, 766 F.2d 370 (8th Cir. 1985) 23

United States v. Campos, 221 F.3d 1143 (10th Cir. 2000) 21

United States v. Carroll, 105 F.3d 740 (1st Cir. 1997) 21

United States v. Czubinski, 106 F.3d 1069 (1st Cir. 1997) 22

United States v. Darby, 37 F.3d 1059 (4th Cir. 1994) 22

United States v. Eastland, 989 F.2d 760 (5th Cir. 1993) 14

United States v. Galbraith, 20 F.3d 1054 (10th Cir. 1994) 22

United States v. Hilton, 257 F.3d 50 (1st Cir. 2001) 21

United States v. Kammersell, 196 F.3d 1137 (10th Cir. 1999) 21

United States v. Keyser, No. ACM 34252, 2001 WL 1525272 (A.F. Ct. Crim. App. Nov. 28, 2001) 22

United States v. Lindemann, 85 F.3d 1232 (7th Cir. 1996) 22, 23

United States v. Murray, 52 M.J. 423, *petition for cert. filed*, No. 00-5415 (July 5, 2000) 21

United States v. Runyan, 275 F.3d 449 (5th Cir. 2001) 1, 11, 15

United States v. Runyan, 290 F.3d 223 (5th Cir.), *reh'g denied*, Nos. 00-10821, 01-11207, 2002 WL 1022102 (5th Cir. May 17, 2002) ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

United States v. Smith, 47 M.J. 588 (N.M. Ct. Crim. App. 1997) 22

United States v. Thomas, 74 F.3d 701 (6th Cir. 1996) 21

STATE CASES

State v. Johnson, 939 S.W.2d 586 (Tex. Crim. App. 1996) 13

STATUTES

18 U.S.C. § 875(c) 22

18 U.S.C. § 982 3

18 U.S.C. § 2251 ..... 3, 6

18 U.S.C. § 2252A 6

18 U.S.C. § 2252A(a)(1) 21

18 U.S.C. § 2252A(a)(2) 3

18 U.S.C. § 2252A(5)(B) 3

18 U.S.C. § 3742(a)(2) 3

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1291 3

TEX. CODE CRIM. PROC. art. 38.23 13

TEX. PENAL CODE § 30.02(a)(3) 12

TEX. PENAL CODE § 31.03(a)-(b)(1) 13

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

U.S. Const. amend. IV 2
U.S. Const. art. I, § 8 2

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Robert Beam Runyan respectfully requests that the Honorable Justices of the Supreme Court of the United States grant a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit rendered in his case on April 18, 2002. In support of his request, Mr. Runyan sets forth the following:

CITATION TO THE OPINIONS BELOW

The original opinion of the United States Court of Appeals for the Fifth Circuit is *United States v. Runyan*, 275 F.3d 449 (5th Cir. 2001) (*Runyan I*) (discussing Fourth Amendment issues only), and is attached as Appendix A. The opinion after remand is *United States v. Runyan*, 290 F.3d 223 (5th Cir.), *reh'g denied*, Nos. 00-10821, 01-11207, 2002 WL 1022102 (5th Cir. May 17, 2002) (*Runyan II*), and is attached as Appendix B. The Order denying Mr. Runyan's Petition for Panel Rehearing is attached as Appendix C.

STATEMENT OF THE BASIS FOR JURISDICTION

The opinion of the United States Court of Appeals for the Fifth Circuit affirming in part Mr. Runyan's conviction was entered on April 18, 2002. Mr. Runyan's Petition for Panel Rehearing was denied on May 17, 2002. Jurisdiction to review the court of appeals' opinion by writ of certiorari

is conferred by Title 28 of the United States Code, Section 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved in the case provide in pertinent part:

> The Congress shall have Power To . . . regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes. . . .

U.S. Const. art. I, § 8.

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV.

STATEMENT OF THE CASE

A. Basis for Federal Review in the First Instance.

Mr. Runyan was charged with violations of the United States Code and his case has proceeded through the appellate courts established to hear appeals of federal district court convictions.

B. Procedural History.

Mr. Runyan was charged with two counts of sexual exploitation of children under 18 U.S.C. § 2251, one count each of distribution and receipt of child pornography under 18 U.S.C. § 2252A(a)(2), possession of child pornography under 18 U.S.C. § 2252A(5)(B), and one count of forfeiture under 18 U.S.C. § 982. Pursuant to a Government motion, the trial court dismissed Counts 2 and 6 prior to trial.

A jury trial took place from April 17, 2000 to April 21, 2000. The jury returned a verdict of guilty on all counts. The trial judge sentenced Mr. Runyan to a term of imprisonment of 300 months, supervised release for a term of three years, and a special assessment of $400.00.

Mr. Runyan timely filed his appeal with the Court of Appeals for the Fifth Circuit pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a)(2). On December 12, 2001 (as revised January 7, 2002) the court of appeals issued a non-dispositive opinion holding that the Government violated the Fourth Amendment when it exceeded the scope of a search conducted by private individuals, and then remanded to the district court for further fact finding on the applicability of the independent source doctrine, an exception to the exclusionary rule.

On January 10, 2002 the district court issued an order providing the requisite findings of fact. On April 18, 2002, the court of appeals held that the independent source exception to the exclusionary rule existed, and affirmed Mr. Runyan's convictions for receipt and possession of child pornography and for sexual exploitation of a child, but reversed his conviction for distribution of child pornography. It vacated the sentence and remanded to the district

court for entry of judgment and resentencing. The court of appeals denied Mr. Runyan's Petition for Panel Rehearing on May 17, 2002.

C. General Statement of Material Facts.

Mr. Runyan lived on his ranch in Santa Anna, a small town in rural west Texas. He was the owner and operator of Gammon Technologies, a computer repair and service company, from 1990 until 1998, so he had a large inventory of computers at his office in the Coleman State Bank Building in Coleman, Texas. (Tr. 119).[1] He also kept computers at home. (Tr. 122).

Mr. Runyan married Judith Runyan ("Judith") in 1985. (Tr. 89). In 1995, Judith and her daughter, Rickie, moved to an apartment in Brownwood, Texas, a town approximately 40 miles from the Runyan ranch, so that Rickie could attend high school without commuting the long distance. (Tr. 90, 116).

In January 1998, Mr. Runyan began working in Fredericksburg, Texas. (Tr. 121-22). He stayed there during the week and returned to his ranch on the weekends. *Id.*

When Rickie graduated from high school in the spring of 1998, she and Judith moved back to the ranch. (Tr. 90). Rickie left to attend Vanderbilt in August 1998. (Tr. 117).

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[1] The court reporter's trial transcript is cited as "Tr. Page Number." The transcript from the Motion to Suppress hearing is cited as "M.T.S. Page Number." Record Excerpts are cited as "R.E. Page Number."

Mr. Runyan gave her his laptop computer to use at college. (Tr. 111).

In January 1999, Mr. Runyan came home to a note from Judith saying that she was leaving him; that same day, Judith moved in with her boyfriend in Brownwood. (Tr. 124). Mr. Runyan filed for divorce in May 1999. (Tr. 90).

In June 1999, Judith and six friends went to the ranch to retrieve personal belongings when she knew that Mr. Runyan was out of town. (Tr. 91-93, 103-04). While there, they allegedly saw items of child and other pornography in the barn and took it, along with Judith's belongings. (Tr. 93-94, 103, 105). In addition, they took a desktop computer, computer storage media (compact disks (CDs), floppy disks, and zip disks), and slides. (Tr. 105).

One of her friends later examined some of the disks and saw images of child pornography. (Tr. 107). Over the next three weeks, Judith gave these items to state and federal law enforcement officials. (Tr. 107-09). These officials subsequently conducted searches of these items in violation of the Fourth Amendment. *Runyan I*, 275 F.3d at 464.

Texas Ranger Bobby Grubbs interviewed Mr. Runyan. (Tr. 419). Mr. Runyan told Ranger Grubbs in a tape-recorded interview that in mid-February 1999 he found a bag containing, among other things, CDs with child pornography on them at a roadside park in Texas. (Government Exhibit 22, 23). He discarded them in his barn several months before Judith discovered and seized items from the barn. *Id.* Although Mr. Runyan admitted becoming inquisitive about pornography available on the internet, he specifically denied sending out (uploading) or receiving

(downloading) any child pornography via the internet. *Id.* No evidence was introduced to controvert this.

While running Gammon, Mr. Runyan often employed teenagers from the local high school to do chores at his office and his ranch, including Misty Metcalf ("Misty"). (Tr. 228). At the time of trial, Misty was 19 years old, and had known Mr. Runyan since she was ten. (Tr. 226-27). She testified that on several occasions when she was 15-17-years old, at his office and ranch, Mr. Runyan took photos of her. (Tr. 237-38, 241). Images of her nude and clothed appeared on polaroid photographs, slides, CDs, and floppy disks. (Government Exhibit 1, 2, 3, 4, 5). Misty was the alleged victim in Count 1, sexual exploitation of a child under 18 U.S.C. § 2251.

In addition, the indictment alleges that Mr. Runyan distributed, received, and possessed child pornography in violation of 18 U.S.C. § 2252A. (Indictment, R.E. 3). The indictment does not allege any specific image as the object of these actions. *Id.* The Government introduced several items showing child pornography, including polaroid photos (Government Exhibit 1), images on computer storage media (floppy disks, CDs, and a tape backup) (Government Exhibit 4, 5, 6, 7, 9, 10, 11, 12), and slides (Government Exhibit 2), taken from Mr. Runyan's property. Also included were images from the hard drives of a desktop computer and a laptop computer. (Government Exhibit 16, 19).

Government expert Supervising Special Agent (SSA) Tim Wargo testified that he analyzed the desktop computer that Judith had taken from Mr. Runyan's home and turned over to law enforcement, and determined that it contained one image of child pornography. (Tr. 559, 563). (The case agent, SSA Rick Nuckles, testified at the

suppression hearing that no pornographic images existed on the desktop hard drive. (M.T.S. 138).) However, SSA Wargo clearly and unequivocally stated that there was no way for him to tell the origin or source of the image – whether it was from a floppy disk, CD, or the internet. (Tr. 600). SSA Wargo also testified that he found three images that appeared to be child pornography on the laptop computer. (Tr. 571). He did not testify that Mr. Runyan created any of the images.

There was no evidence indicating that Mr. Runyan had access to a scanner, nor was there a slide projector found in his home. (Tr. 483). Misty did have access to a scanner. (Tr. 645).

REASONS FOR GRANTING THE WRIT OF CERTIORARI

REASON I

IN FINDING THAT INFORMATION DERIVED FROM A PRIVATE PARTY SEARCH THAT WAS ILLEGAL UNDER STATE LAW SUPPORTED APPLICATION OF THE INDEPENDENT SOURCE EXCEPTION TO THE EXCLUSIONARY RULE, THE COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

STATEMENT OF FACTS PERTINENT TO REASON I

Mr. Runyan owned his ranch prior to his marriage to Judith. (M.T.S. 29). It was listed as his separate property in the couple's prenuptial agreement. (M.T.S. 30). Judith

moved from the ranch into a house in another town with her boyfriend in January 1999. (M.T.S. 2, 17). Mr. Runyan filed for divorce in May 1999. (M.T.S. 2-3).

On Thursday, June 17, 1999, Judith and her boyfriend drove to the ranch. (M.T.S. 4, 28). The gate was chained and locked, and Judith did not have a key. (M.T.S. 4, 28, 31). She crawled over the gate and walked to the house. (M.T.S. 4-5, 28). She noticed surveillance cameras that had not been there previously. (M.T.S. 5). She looked in the windows to see whether her personal belongings were still there, then left. *Id.* That night, she and her daughter Rickie decided to go back to the house the following day to retrieve their belongings. *Id.*

On Friday morning, Judith and Rickie arrived at the ranch. The gate was still chained and locked, so they crawled over it and went to the house. (M.T.S. 31). The locks on all of the doors were changed, so Judith had no key to get into the house or barn. (M.T.S. 29).

The breakfast room had two sets of windows, one on top of the other. (Photograph at R.E. 6). The bottom set was locked. (Tr. 146-47). They pulled a picnic table underneath this bank of windows. *Id.* (The affidavit submitted in support of the search warrant for the house referred to this as a third story room. (R.E. 9).) They removed the screens from the top windows, which were not locked. (M.T.S. 32). They used a stick to unlock the bottom windows, and crawled in. (Tr. 147, 172). They then looked through the house. (M.T.S. 5).

That afternoon, a friend of Rickie's came to the ranch and all three women tried to get into the barn. The lock on the barn had been changed, too. (Tr. 158). They used a stepladder and crawled through a window in the barn.

(Photograph at R.E. 7; M.T.S. 6). In the barn, the friend found the black bag containing a polaroid camera with film, a vibrator, some polaroid photographs, and some computer storage media. (M.T.S. 6, 42). Additionally, they opened two other boxes that were under the black bag, containing video tapes. (M.T.S. 48). Judith took this black bag with her when she returned to her house in Brownwood. (M.T.S. 7). Judith's boyfriend cut the lock on the gate to the ranch with bolt cutters that night. (M.T.S. 7).

The following day, someone put a hat or tape over one of the surveillance cameras. (M.T.S. 32-34). Then, Judith and six other people went through the house and barn, packing items Judith identified as hers. (M.T.S. 57). Judith asked one of her friends, Brandie Epp, to dismantle the desktop computer they found in the home, take it back to her house in Brownwood, reassemble it, and look on the various disks they had seized from the ranch to see what was on them. (M.T.S. 8-9, 88). Ms. Epp did so, and saw images of child pornography on the CDs and floppy disks. (M.T.S. 91). She did not view any images on the zip disks, because the hardware needed to read the zip disks was not hooked up. (M.T.S. 92).

With respect to her seizure of the computer storage media from the ranch, Judith stated, "if I found them I took them" (Tr. 184), even though she testified, "I knew they were not mine" (M.T.S. 58), and "they were not my disks" (M.T.S. 63).

When law enforcement officers executed the search warrants, they seized about 250 computer storage media that were in plain view. (Tr. 479). Of these, only one – a backup tape – contained illegal pornography. (M.T.S. 138; Tr. 465). It is an amazing coincidence that although none

of these media were marked in any way to indicate that they contained pornography, Judith was able to collect all but one matter containing illegal pornography.

That same evening, Saturday, the Brown County Sheriff's Department was called. (M.T.S. 11). Upon meeting with Judith at her home and viewing some images from a CD on the computer, a deputy sheriff took possession of the storage media in question. (M.T.S. 11). Judith did not give any polaroid photographs, the black bag, or the desktop computer to the deputy at this time; only the computer storage media. (M.T.S. 11, 64, 70). The following Monday morning, she gave additional CDs to the Santa Anna police chief, who said he would see to it that the Texas Rangers got it. (M.T.S. 69, 71).

Over the next several days, Judith also met with Ranger Grubbs, to whom she turned over several boxes and bags of items that she had taken from Mr. Runyan's home. (M.T.S. 72-73, 81). Judith "didn't know if it was child pornography" that was in the boxes and bags. (Tr. 191).

Both state and federal law enforcement officers subsequently conducted several searches of these items, in violation of the Fourth Amendment. *See Runyan I*, 275 F.3d at 464. The federal officials eventually obtained search warrants, but all of the information contained in the respective affidavits was derived directly or indirectly from the initial searches by the private parties.

ARGUMENT AND AUTHORITIES IN SUPPORT OF REASON I

A. Background.

An affidavit supporting one of the federal search warrants contained a statement that the affiant, SSA Nuckles, had conducted a cursory review of the disks, and the court of appeals found that that information should be stricken because that pre-warrant search violated the Fourth Amendment. *Runyan I*, *supra*, 275 F.3d at 464. The information remaining consisted of that obtained from Misty Metcalf, who was identified from evidence taken from the ranch, and statements from Judith Runyan concerning her searches of the disks and computer she took from the ranch. While information from Mr. Runyan's statement to Ranger Grubbs was also included, it did not establish probable cause to believe that evidence of a crime would be found on the disks at issue. The court of appeals found that because the police searched more disks than the private searchers had reviewed without first obtaining a warrant, the law enforcement searches exceeded the scope of the private searches and violated the Fourth Amendment. *Id.* The court remanded to the district court to conduct a hearing on the issues of whether the police would have sought the warrants and whether the magistrate judge would have issued the warrants in the absence of the illegality. *Id.* at 468.

After remand, the court of appeals found that an independent source provided an exception to the exclusionary rule and thus, none of the items of evidence should have been suppressed. *Runyan II*, 290 F.3d at 235-37. The "independent source" was the magistrate judge's issuance of two federal search warrants that were based almost

exclusively on evidence seized as a result of illegal private searches. *Id.* at 237.

The court of appeals expressly did not consider whether the disks should be suppressed based on the fact that the private searches were illegal:

> Runyan also appears to argue, albeit obliquely, that all the disks removed from his ranch by Judith should be suppressed because Judith entered Runyan's property illegally. *We need not address the merits of this contention.*

Id. at 237 n.10 (emphasis added).

B. The Private Searches were Illegal Under Texas Law.

In his original Brief, Mr. Runyan alleged that Judith committed burglary to obtain such evidence from Mr. Runyan's ranch by entering without his consent and stealing the computer storage media and other property. The court of appeals found that because there was some ambiguity in the record about whether Mr. Runyan's estranged wife had his authority to be on the property, viewing the evidence in the light most favorable to the Government, "we must presume that Judith had permission to enter the ranch and retrieve her property. Accordingly, Judith's private search was not illegal under Texas law." *Id.* This finding was the subject of Mr. Runyan's Petition for Panel Rehearing.

Texas law states that a person commits burglary when he or she enters a building or habitation without the effective consent of the owner and commits or attempts to commit, *inter alia*, theft. TEX. PENAL CODE § 30.02(a)(3).

One commits theft when "he unlawfully [without the owner's consent] appropriates property with intent to deprive the owner of property." TEX. PENAL CODE § 31.03(a)-(b)(1).

Regardless of whether she entered the property without Mr. Runyan's permission, it is undisputed that Judith took items from Mr. Runyan's ranch that did not belong to her without Mr. Runyan's consent. With regard to the disks, she testified, "if I found them I took them" (Tr. 184), even though she stated, "I knew they were not mine" (M.T.S. 58), and "they were not my disks" (M.T.S. 63). Therefore, even if Judith had Mr. Runyan's permission to enter the ranch to retrieve her *own* belongings, at a minimum, she committed theft of the property that did not belong to her. She stole the disks and other property which later formed the basis of the lower court's finding of an "independent source."

By statute, Judith's illegal conduct renders the evidence she seized inadmissible in state court. TEX. CODE CRIM. PROC. art. 38.23. The Texas Court of Criminal Appeals, the highest Texas court for criminal matters, has made that principle clear. *State v. Johnson*, 939 S.W.2d 586, 588 (Tex. Crim. App. 1996).

C. Illegal Private Conduct Should Not Serve as the Basis to Excuse Unconstitutional Government Conduct.

It is fundamentally unfair and offends notions of due process for a court to use illegal private searches to cure illegal police searches. Although this appears to be a question of first impression in this Honorable Court and in the body of federal law across the nation, the fact pattern

in the instant case is precisely the kind of situation the same court below envisioned almost a decade ago when it stated: "there may be an instance of abuse and/or collusion in which a court might choose to exercise its supervisory powers and exclude evidence obtained in violation of state law." *United States v. Eastland*, 989 F.2d 760, 767 n.11 (5th Cir. 1993).

Although counsel could find no reported cases where the "independent source" was based on an illegal search by private parties, the case law is clear that the exception requires an *independent and lawful* source. *Murray v. United States*, 487 U.S. 533, 542, 108 S. Ct. 2529, 2535, 101 L. Ed. 2d 472 (1988). Even the court of appeals' opinion states that the independent source exception "dictates that evidence obtained from an illegal search is admissible if the same evidence was also obtained from a *lawful* source independent of the illegality." *Runyan II*, *supra*, 290 F.3d at 235 (emphasis added).

In the instant case, if it were not for the illegal private searches, there would be no "independent source" to serve as an exception to the exclusionary rule, and the constitutional violations committed by the various law enforcement agents would have resulted in suppression of the evidence.

In the usual situation, the illegality of a prior police search can be cured by the independent source doctrine if there is both lawful and unlawful police conduct, but no connection between the illegal conduct and the subsequent lawful search. Usually, one is dealing with a warrantless search by the police, followed by a search conducted pursuant to a warrant not tainted by the prior illegal police conduct. *See, e.g., Murray v. United States*, *supra*.

Another similar situation is where the independent source is found in a lawful private party search. Because a private party cannot violate the Fourth Amendment, lawful conduct by private searchers that would violate the Constitution if done by police can provide an independent source to cure *subsequent* illegal police conduct. *See, e.g., United States v. Jacobsen*, 466 U.S. 109, 115, 104 S. Ct. 1652, 1657, 80 L. Ed. 2d 85 (1984).

In both of the foregoing situations, one party (either a police agency or a private party) is acting lawfully. However, in the instant case, *no one* who conducted a search acted lawfully before the federal warrant was issued. The law of the case is that the state and federal police violated the Fourth Amendment. *Runyan I, supra*, 275 F.3d at 464. The private party searchers violated state law by committing theft of the very evidence serving as the basis for these convictions (the photographs, computers, and disks), and *the law enforcement personnel were aware of this illegality as soon as Judith admitted stealing objects she did not own*. While evidence as to their knowledge was never specifically elicited from the law enforcement agents involved, it is a reasonable inference from the evidence that was produced that the law enforcement officials were informed of the circumstances under which the evidence was obtained. Thus, law enforcement officials knew from the beginning they were dealing with stolen property. It is also reasonable to assume that the state law enforcement officials involved in this case – the Texas Ranger, city police chief, sheriff, and District Attorney – all were aware of Texas law making evidence obtained illegally, even by a private party, inadmissible at trial.

By upholding conduct that violated state law as the basis of an "independent source" finding, the court of

appeals sanctioned conduct that is *criminal*. The independent source doctrine is not intended to reward criminal conduct; it is intended to put the government in the same position it would be in but for the illegality. *Murray v. United States*, *supra*, 487 U.S. at 542, 108 S. Ct. at 2535, 101 L. Ed. 2d 472. Counsel cannot find another case which upholds a search pursuant to a federal search warrant which followed *both* criminal activity by a private searcher *and* unconstitutional conduct by state and federal law enforcement officers.

This Court has the authority to find this evidence inadmissible. "Federal courts may use their supervisory power in some circumstances to exclude evidence taken from the *defendant* by 'willful disobedience of law.'" *United States v. Payner*, 447 U.S. 727, 735 n.7, 100 S. Ct. 2439, 2446, 65 L. Ed. 2d 468 (1980) (emphasis in original). It is also important to recognize the principle that "A state officer who disobeys [a state regulation] needs only to turn his evidence over to the federal prosecutor, who may freely utilize it under today's innovation in disregard of the disciplinary policy of the State's exclusionary rule. I cannot think why the federal courts should thus encourage state illegalities." *Elkins v. United States*, 364 U.S. 206, 245-46, 80 S. Ct. 1453, 1460, 4 L. Ed. 2d 1688 (1960) (Frankfurter, J., dissenting).

Further, this Court has stated:

> What the concept [of comity] does represent is a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly

> interfere with the legitimate activities of the States.

Younger v. Harris, 401 U.S. 37, 44, 91 S. Ct. 746, 750-51, 27 L. Ed. 2d 669 (1971).

The same reasoning applies in the instant case; all of the evidence is inadmissible in state court, because Texas has chosen to protect the privacy interests of its citizens by enacting a statute that makes evidence obtained illegally, even by a private party, inadmissible. This interest was frustrated by the state authorities' subsequent relinquishment of the evidence to federal authorities.

In civil cases, federal courts have interpreted and applied state substantive law since 1938. *Salve Regina College v. Russell*, 499 U.S. 225, 111 S. Ct. 1217, 113 L. Ed. 2d 190 (1991) (stating that "*Erie* mandates that a federal court sitting in diversity apply the substantive law of the forum State, absent a federal statutory or constitutional directive to the contrary.") (citing *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78, 58 S. Ct. 817, 822, 82 L. Ed. 1188 (1938)). The Texas statute making illegal private searches inadmissible, and the controlling cases from the Texas Court of Criminal Appeals applying the statute, are straightforward and clear, and no federal court should have difficulty in applying them.

"In most cases, comity and respect for federalism compel us to defer to the decision of state courts on issues of state law. That practice reflects our understanding that the decisions of state courts are definitive pronouncements of the will of the States as sovereigns." *Bush v. Gore*, 531 U.S. 98, 112, 121 S. Ct. 525, 534, 148 L. Ed. 2d 388 (2000) (Rehnquist, C.J., concurring). If federal courts can read, interpret, and apply state law in civil cases where only

money is at stake, then certainly they can do so in criminal cases where a citizen's liberty is at stake.

This Court has never addressed the issue presented in the instant case – whether acts that are illegal under State law can serve as the sole basis for the independent source doctrine. Therefore, because this important question of federal law has not been, but should be, settled by this Court, this Honorable Court should grant the Petition for Writ of Certiorari.

REASON II

WHERE THERE WAS NO PROOF OF ACTUAL ACTIVITY IN MORE THAN ONE STATE, AND THE COURT OF APPEALS FOUND THAT SUCH INTRASTATE USE OF THE INTERNET ALONE SATISFIED THE JURISDICTIONAL ELEMENT OF INTERSTATE COMMERCE, THE COURT OF APPEALS FOR THE FIFTH CIRCUIT HAS DECIDED AN IMPORTANT FEDERAL QUESTION THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

REASON III

WHERE THERE WAS NO PROOF OF ACTUAL ACTIVITY IN MORE THAN ONE STATE, AND THE COURT OF APPEALS FOUND THAT SUCH INTRASTATE USE OF THE INTERNET ALONE SATISFIED THE JURISDICTIONAL ELEMENT OF INTERSTATE COMMERCE, THE COURT OF APPEALS FOR THE FIFTH CIRCUIT HAS DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH DECISIONS OF OTHER UNITED STATES COURTS OF APPEALS.

STATEMENT OF FACTS PERTINENT TO REASONS II AND III

There was no direct evidence as to the source of the images found on the various computer storage media or the hard drives of the computers. The court of appeals found that circumstantial evidence supported the Government's theory that the source of the illegal images was the internet. *Runyan II*, *supra*, 290 F.3d at 239, 242.

The Government presented the testimony of a representative from Mr. Runyan's internet service provider, who testified that Mr. Runyan had an internet account, and that internet activity took place on the desktop and laptop computers. (Government Exhibit 15, 18, 30, 33). Most significantly, she testified that *the servers were located in Texas*. (Tr. 402) (emphasis added). The Government did not produce any evidence to indicate that any facet of Mr. Runyan's alleged internet use with respect to these charges took place outside the state of Texas.

ARGUMENT AND AUTHORITIES IN SUPPORT OF REASONS II AND III

The Commerce Clause limits the government's power to proscribe conduct to those activities that involve interstate commerce. *United States v. Lopez*, 514 U.S. 549, 115 S. Ct. 1624, 131 L. Ed. 2d 626 (1995). The court of appeals found that Mr. Runyan's alleged use of the internet alone supplied the required interstate commerce connection. *Runyan II*, *supra*, at 239. However, there was no proof at all in this case that any internet use involved activity or physical facilities that crossed state lines. In fact, the only evidence at trial on the issue indicated that both Mr.

Runyan and his internet service provider were located only in Texas. (Tr. 402).

The Government had the burden of proving the jurisdictional element of interstate commerce, and could have attempted to meet this burden by eliciting testimony concerning whether the internet use alleged in the instant case actually involved transmission of information across state lines. The record is completely devoid of any such evidence, and the Court of Appeals erred in finding that the Government met its burden in proving the jurisdictional element of interstate commerce.

A. Novel Question.

This Honorable Court has never addressed the general issue in child pornography cases of whether use of a facility or means capable of interstate commerce *alone*, without proof of actual interstate commerce use in a particular case, is sufficient to satisfy the jurisdictional requirement. Nor has the Court answered the specific questions of whether the internet itself is such a facility or means, and whether proof of internet use alone suffices to establish jurisdiction of the federal courts in child pornography cases. Considering the increasing volume of cases involving internet use and the conflicts among the courts of appeals, these important questions of first impression are now ripe for Supreme Court review.

Therefore, because this important question of federal law has not been, but should be, settled by this Court, this Honorable Court should grant the Petition for Writ of Certiorari.

B. Conflict Among the Circuits.

The Fifth Circuit has aligned itself with the First Circuit in holding that "transmission of photographs by means of the Internet is tantamount to moving photographs across state lines and thus constitutes transportation in interstate commerce." *Runyan II*, *supra*, 290 F.3d at 239 (quoting *United States v. Carroll*, 105 F.3d 740, 742 (1st Cir. 1997)); *see also United States v. Hilton*, 257 F.3d 50, 54 (1st Cir. 2001) (stating that proof of transmission of pornography over the internet satisfies the interstate commerce element). In the instant case, and in *United States v. Hilton*, *supra*, there was no evidence of actual interstate activity. Other decisions from the courts of appeals which contain the same broad holding, however, are distinguishable and thus conflict with the First and Fifth Circuits because in those cases, the evidence proved actual activity in two or more states. *See*, *e.g.*, *United States v. Thomas*, 74 F.3d 701, 707 (6th Cir. 1996) (finding that "the transmissions began with computer-generated images in California and ended with the same computer-generated images in Tennessee"); *United States v. Murray*, 52 M.J. 423, 425, *petition for cert. filed*, No. 00-5415 (July 5, 2000) (stating that the owner of the defendant's internet service provider established that the provider received information from another state and that his servers were located in other states). *See also United States v. Campos*, 221 F.3d 1143 (10th Cir. 2000) (finding no challenge to interstate commerce element in 18 U.S.C. § 2252A(a)(1) prosecution but evidence proved Campos sent illegal images from Oklahoma to Illinois via the internet); *United States v. Kammersell*, 196 F.3d 1137, 1139 (10th Cir. 1999) (stating that a threat which traveled via AOL instant message from Utah to Virginia and then back to Utah is

sufficient to satisfy jurisdictional requirement under 18 U.S.C. § 875(c)).

Because these cases involved fact patterns that included actual interstate activity, as opposed to solely intrastate activity, they are in conflict with the holdings of the First and Fifth Circuits. It is also interesting to note that two decisions from lower military appellate courts address the issue and conflict with each other. The Navy-Marine Corps Court of Criminal Appeals found that intrastate internet use constitutes interstate commerce, even though the evidence in that case indicated that the defendant knew the images had crossed state lines. *United States v. Smith*, 47 M.J. 588, 592 (N.M. Ct. Crim. App. 1997). However, its sister court, the Air Force Court of Criminal Appeals, found that but for a guilty plea, evidence of mere intrastate internet use would not satisfy the interstate commerce requirement. *United States v. Keyser*, No. ACM 34252, 2001 WL 1525272 (A.F. Ct. Crim. App. Nov. 28, 2001).

There was testimony in the instant case that Mr. Runyan used a telephone line to access the internet. (Tr. 405). Therefore, cases from the courts of appeals regarding whether intrastate use of telephone lines constitutes a violation of the wire fraud statute are relevant. The lower courts of appeals that have addressed the issue universally hold that such intrastate use does *not* confer federal jurisdiction. *See, e.g., Cofacredit, S.A. v. Windsor Plumbing Supply Co., Inc.*, 187 F.3d 229, 243 (2d Cir. 1999); *Annulli v. Panikkar*, 200 F.3d 189, 200-01 (3d Cir. 1999); *United States v. Czubinski*, 106 F.3d 1069, 1074 n.5 (1st Cir. 1997); *United States v. Lindemann*, 85 F.3d 1232, 1241 (7th Cir. 1996); *United States v. Darby*, 37 F.3d 1059, 1067 (4th Cir. 1994); *United States v. Galbraith*, 20 F.3d 1054,

1057 (10th Cir. 1994); *Smith v. Ayres*, 845 F.2d 1360, 1366 (5th Cir. 1988); *United States v. Bryant*, 766 F.2d 370, 375 (8th Cir. 1985).

This holding is based on the fact that Congress does not have authority to regulate purely intrastate activity under the Commerce Clause. *United States v. Lindemann*, *supra*, at 1241. It is important to note that there is a split among the courts of appeals on the issue of whether a defendant must reasonably foresee the use of interstate communication in order to violate the wire fraud statute. *Compare United States v. Lindemann*, *supra*, at 1241 (stating that "the government must prove that the defendant knew he was involved in the wrongful conduct, but need not prove that the defendant knew the 'interstate nexus' of his actions") *with United States v. Brumley*, 59 F.3d 517, 521 n.8, 522 (5th Cir. 1995) (reversing conviction and noting conflict between Fifth Circuit and Second and Eighth Circuits on this issue, stating "There is not sufficient evidence in this record upon which a trier of fact could find *beyond a reasonable doubt* that it was foreseeable to Brumley or Cely that their actions would cause the Western Union agents to make interstate wire communications") (emphasis in original).

In the instant case, without proof that Mr. Runyan's use of the internet *actually* involved activity that crossed state lines, the Government failed to establish an essential element of the offense, and the lower court's opinion is in conflict with holdings from its own court as well as sister courts of appeals.

Therefore, because the Court of Appeals for the Fifth Circuit has decided an important federal question in a way that conflicts with decisions of other United States Courts

of Appeals, this Honorable Court should grant the Petition for Writ of Certiorari.

CONCLUSION AND PRAYER

This Petition presents important federal questions that have not been but should be decided by this Court. Further, the decision of the Court of Appeals for the Fifth Circuit is in conflict with decisions of other United States Courts of Appeals. Mr. Runyan respectfully requests that this Honorable Court grant the Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX A

UNITED STATES OF AMERICA, Plaintiff-Appellee v. ROBERT BEAM RUNYAN, Defendant-Appellant; UNITED STATES OF AMERICA, Plaintiff-Appellee v. ROBERT BEAM RUNYAN, Defendant-Appellant

No. 00-10821, No. 01-11207

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

2002 U.S. App. LEXIS 7193

April 18, 2002, Decided

JUDGES:

Before KING, Chief Judge, and JOLLY and BENAVIDES, Circuit Judges.

OPINION BY:

KING

OPINION:

KING, Chief Judge:

Defendant-Appellant Robert Beam Runyan was convicted of sexual exploitation of a child in violation of 18 U.S.C. § 2251 and of distribution, receipt, and possession of child pornography in violation of 18 U.S.C. § 2252A. In two separate actions, Runyan appeals his conviction (No. 00-10821) and the district court's denial of his post-trial motion for a new trial (No. 01-11207). On September 24, 2001, we consolidated these two cases for the purposes of appeal. On December 10, 2001, this court issued a non-dispositive opinion: (1) holding that aspects of the Government's investigation violated the Fourth Amendment; and (2) remanding the case to the district court for further factfinding that would enable this court to assess the applicability of exceptions to the exclusionary rule. On January 10, 2002, the district court issued an order

providing the requisite findings of fact. We now conclude our analysis of Runyan's Fourth Amendment claims and address Runyan's remaining claims, from both his appeal of his conviction and his appeal of the district court's denial of his motion for new trial. For the following reasons, we AFFIRM Runyan's convictions for receipt and possession of child pornography and for sexual exploitation of a child, but REVERSE his conviction for distribution of child pornography. We also VACATE Runyan's sentence and REMAND to the district court for entry of judgment and resentencing consistent with this opinion.

I. Factual and Procedural Background

The facts of this case are described in detail in this court's December 10, 2001 decision. Accordingly, we only briefly reiterate the underlying facts of the case. We address specific facts pertinent to each of Runyan's remaining claims in greater detail within our discussion of each claim below.

In brief, Robert Beam Runyan ("Runyan") and his wife Judith Runyan ("Judith") separated in January of 1999. In June of 1999, Judith (accompanied at different times by her daughter and various friends) made several trips to Runyan's ranch to retrieve items of her personal property while Runyan was out-of-town. At the ranch, Judith and one of her companions found two duffel bags in the barn containing items of pornography, including Polaroid photographs of two individuals, one of whom appeared to be a very young teenager. Judith removed these items from the ranch. Judith and her companions also removed from the ranch a desktop computer and a collection of floppy disks, compact discs ("CDs"), and ZIP disks

(collectively, "the disks") that were lying on the floor surrounding the computer.

One of Judith's companions, Brandie Epp, reassembled the computer at Judith's residence and examined approximately 20 of the CDs and floppy disks taken from the ranch. Epp discovered that some of these CDs and floppy disks contained images of child pornography.[1] Epp contacted the sheriff's department and turned these materials over to a deputy. Over the next few weeks, Judith turned over various additional items found at the Runyan ranch to a number of different law enforcement agencies. These items included the desktop computer, additional disks containing child pornography, and the duffel bags found in the barn.

Texas Ranger Bobby Grubbs ("Ranger Grubbs") used his computer to view some of the disks delivered by Judith and observed images of child pornography. He printed out several of these images on a color printer and showed them to members of the Coleman County District Attorney's staff. An investigator in the District Attorney's office, Darla Tibbetts, tentatively identified the girl photographed in one of the images. An intern working for the District Attorney's office, Melissa Payne, was brought to the sheriff's office to assist with the identification. She positively identified the girl in the pictures as Misty Metcalf ("Misty"), a former high school classmate.[2]

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[1] Epp did not view any of the images on the ZIP disks because the necessary hardware was not connected.

[2] There is conflicting testimony in the record regarding whether Payne was shown Polaroid photographs or computer printouts of Misty.

On June 28, 1999, upon learning that he was a potential suspect, Runyan met with Ranger Grubbs. At this meeting, after Runyan had been given Miranda warnings, he stated that he found a bag of pornography at a rest stop. Runyan admitted that he viewed the materials in the bag and that, out of curiosity, he used his computer to view child pornography available on the Internet.[3]

On July 7, 1999, Customs Service Special Agent Rick Nuckles ("Agent Nuckles") joined the investigation. Agent Nuckles examined several images from each floppy disk, ZIP disk, and CD turned over by Judith and Epp. Agent Nuckles found two images of Misty, apparently taken with a digital camera or taken with a Polaroid camera and then scanned into a computer.

Also on July 7, Tibbetts and Ranger Grubbs interviewed Misty. Misty stated that Runyan hired her when she was a young teenager to perform odd jobs around his ranch and to iron clothes for him. She said that he approached her when she was fifteen about posing for nude photographs. Misty told Tibbetts that Runyan had taken sexually explicit photographs of her on numerous occasions when she was between the ages of fifteen and seventeen. She reported that Runyan had sometimes paid her approximately five dollars per photographic session and that he had promised her more money once he sold the pictures over the Internet to customers in Japan.

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[3] However, Runyan maintains that he never uploaded or downloaded any images containing child pornography from the Internet at these times.

Agent Nuckles then filed two applications for federal search warrants, supported by his own affidavits. The first application sought a warrant to search the desktop computer and all the disks for files containing illegal images. The second application sought a warrant to search Runyan's ranch house for any and all computers, computer hardware, software, and computer devices. The affidavits supporting these applications included statements made by Misty and Judith to Ranger Grubbs as well as information from Runyan's voluntary statement to Ranger Grubbs. In addition, one of the affidavits contained a statement indicating that Agent Nuckles had conducted a "cursory" review of the computer storage media. Magistrate Judge Philip Lane issued both warrants. Law enforcement officials subsequently searched Runyan's ranch house and discovered a computer backup tape that contained one picture of child pornography.

On October 13, 1999, Runyan was indicted on six counts of child pornography charges. Runyan filed three separate motions to suppress the evidence against him, primarily contending that the pre-warrant searches of the disks conducted by various law enforcement officials involved in the investigation violated his Fourth Amendment rights. The trial court held a hearing on Runyan's motions to suppress on April 20, 2000. At the close of the hearing, the trial court denied the motions, finding that the pre-warrant police searches did not violate Runyan's Fourth Amendment rights.

On April 21, 2000, a jury convicted Runyan of four counts:[4] Count 1 – sexual exploitation of a child in violation of 18 U.S.C. § 2251; Count 3 – distribution of child pornography in violation of 18 U.S.C. § 2252A(a)(2); Count 4 – receipt of child pornography in violation of 18 U.S.C. § 2252A(a)(2); and Count 5 – possession of child pornography in violation of § 2252A(a)(5)(B). On July 28, 2000, the district court sentenced Runyan to 240 months on Count 1; 60 months on Count 3, to be served consecutively to Count 1; and 180 months on Counts 4 and 5, to run concurrently with the sentence imposed on Count 1, for a total sentence of 300 months of imprisonment. In addition, the district court imposed a three-year term of supervised release and mandatory special assessments totaling $400.

Runyan timely appealed his convictions and his sentence, contending that: (1) the trial court erred in failing to suppress the evidence obtained directly and indirectly from the pre-warrant police searches; (2) there was insufficient evidence introduced at trial to establish the interstate commerce element of each of the four charges; (3) the trial court erred in refusing to order the Government to produce Misty's boyfriend's computer and in refusing to conduct an in camera review of evidence on that computer that Runyan contends was exculpatory; (4) the trial court erred in admitting evidence that Runyan refused to consent to the search of the desktop computer; and (5) the trial court erred in not grouping all the counts

[4] Counts 2 and 6 were dismissed prior to trial.

of his conviction in the sentencing determination.[5] While that appeal was pending before this court, Runyan filed a motion for new trial based on newly-discovered evidence, alleging that Misty's boyfriend's computer contained exculpatory evidence that the Government withheld prior to trial. The district court denied this motion on September 7, 2001, and Runyan timely appealed to this court. We consolidated Runyan's two actions for the purposes of appeal on September 24, 2001.

II. Runyan's Fourth Amendment Claims

Runyan seeks to suppress evidence obtained as a result of the state and federal law enforcement officials' pre-warrant searches of the disks. Runyan argues that these searches violated the Fourth Amendment and that no exceptions to the exclusionary rule are applicable. Runyan also seeks to suppress evidence obtained pursuant to the search warrants, arguing that such evidence is "the fruit of the poisonous tree" because these warrants were procured based on information obtained through the prior illegal searches.[6]

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[5] The Government concedes that Runyan was incorrectly sentenced as a result of the trial court's failure to group the counts of his conviction.

[6] Runyan also argues that the warrants were invalid because Agent Nuckles's affidavit contained a statement that Runyan contends is materially false (i.e., a statement indicating that the desktop computer was in Runyan's sole possession from 1995 to 1998) and because the affidavit did not contain any information about Misty's credibility (i.e., the fact that she was on probation). However, a misstatement can vitiate an affidavit "only if it is established that the misstatement was the product 'of deliberate falsehood or of reckless

(Continued on following page)

In reviewing a district court's denial of a motion to suppress evidence, we review the district court's factual findings for clear error and its conclusions regarding the constitutionality of a warrantless search de novo. United *States v. Vega*, 221 F.3d 789, 795 (5th Cir. 2000). We view the facts underlying the suppression determination in the light most favorable to the prevailing party, which in this case is the Government. *United States v. Howard*, 106 F.3d 70, 73 (5th Cir. 1997). It is the defendant's burden to prove a Fourth Amendment violation by a preponderance of the evidence. *United States v. Riazco*, 91 F.3d 752, 754 (5th Cir. 1996). However, once the defendant proves such a violation, the burden shifts to the government to demonstrate why the exclusionary rule should not apply to the fruits of the illegal search or seizure. *United States v. Houltin*, 566 F.2d 1027, 1031 (5th Cir. 1978).

In our prior opinion, this court held that the police violated Runyan's Fourth Amendment rights when they conducted a warrantless examination of disks that the

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disregard for the truth[;] allegations of negligence or innocent mistake are insufficient.'" *United States v. Martin*, 615 F.2d 318, 329 (5th Cir. 1980) (quoting *Franks v. Delaware*, 438 U.S. 154, 171, 57 L. Ed. 2d 667, 98 S. Ct. 2674 (1978)). Similarly, omissions cannot undermine the validity of a warrant unless such omissions are "made intentionally or with a reckless disregard for the accuracy of the affidavit; negligent omissions will not undermine the affidavit." *Id.* The defendant bears the burden of showing by a preponderance of the evidence that a misstatement or omission was more than mere negligence. *Id.* Runyan fails to meet this burden. An unsupported assertion that an affidavit contains a misstatement (or an omission) does not give rise to the inference that the affiant acted with reckless disregard for the accuracy of the information presented to the magistrate, particularly where the misstated or omitted facts in question are of only minor significance to the finding of probable cause.

private searchers (Judith and Epp) had not examined. *See United States v. Runyan*, 275 F.3d 449, 464 (5th Cir. 2001). While we noted that the disks (and any evidence obtained as a result of the information found on the disks) were potentially subject to suppression due to this Fourth Amendment violation, we indicated that this evidence would still be admissible if the Government could demonstrate that an exception to the exclusionary rule is applicable in the instant case. We then remanded to the district court for factual findings relevant to this issue. The Government now argues that this court should apply the "independent source" exception to the exclusionary rule, which dictates that evidence obtained from an illegal search is admissible if the same evidence was also obtained from a lawful source independent of the illegality.

As we noted in our December 10, 2001 opinion, under the "independent source" exception to the exclusionary rule, the government must make two showings in order for a lawful search pursuant to a warrant to be deemed "genuinely independent" of a prior illegal search: (1) that the police would still have sought a warrant in the absence of the illegal search; and (2) that the warrant would still have been issued (i.e., that there would still have been probable cause to support the warrant) if the supporting affidavit had not contained information stemming from the illegal search. 275 F.3d at 467 (citing *Murray v. United States*, 487 U.S. 533, 542, 101 L. Ed. 2d 472, 108 S. Ct. 2529 (1988)). In the instant case, the Government contends that the magistrate judge would have issued the two warrants permitting the police to search Runyan's computer and disks and Runyan's home even if the police had never conducted a pre-warrant search of the storage media. According to the Government, the information that

the police obtained from interviews with Judith and Misty and from Runyan's admissions in his statement to Ranger Grubbs was sufficient to compel the police to seek a warrant and to establish probable cause for a warrant to issue. Thus, because the police obtained the same information acquired through their pre-warrant search of the disks from the subsequent, lawful searches pursuant to the warrant, these subsequent searches were an "independent source" of the images on the disks and this evidence is admissible at trial.

In our December 10, 2001 opinion, we noted that one of the affidavits submitted by Agent Nuckles in support of the warrant applications contained a brief reference to his pre-warrant search of the computer storage devices. We found that the inclusion of this statement in the warrant application raised a question about what role the pre-warrant searches might have played in the issuance of the warrants. Because the district court made no factual findings at the suppression hearing enabling this court to address this issue, we remanded the case to the district court "to conduct such proceedings as are necessary to make findings of fact addressing" these questions.

On January 3, 2002, the district court conducted an evidentiary hearing on these issues. Agent Nuckles, Ranger Grubbs, and Magistrate Judge Philip Lane all testified at this hearing. On January 10, 2002, the district court entered, inter alia, the following factual findings addressing whether the police would have sought the warrant in the absence of the illegal search:

> 7. Agent Nuckles'[s] decision to seek the search warrants in this case was unaffected by the fact that the police, including himself, may have looked at more disks than did the private parties.

> 8. The Court finds that the police would have sought the warrants even if they had not exceeded the scope of the private party searches.

In support of these findings, the district court noted that:

> The police, in total, received thirteen (13) recordable compacts [sic] discs in this case, only ten (10) of which contained evidence of child pornography. Of those thirteen, eleven initially came from Brandie Epp and Judith Runyan and had clearly been searched by private parties. . . . Assuming without deciding that the two (2) recordable CDs not initially turned over contained child pornography images, then eight (8) of the eleven (11) CDs that were initially turned over and previously searched by private citizens necessarily contained images of child pornography. . . . The fact that the police "searched" all the storage media and additionally recovered one (1) zip disk, 13 to 15 floppies, and between zero (0) and two (2) additional CDs containing child pornographic images did not tip the balance in favor of the decision to seek warrants. In other words, 15 floppies plus 10 CDs plus 1 zip disk equals approximately 26 external storage media containers. The fact that the police determined that all 26 contained child pornographic images instead of limiting their pre-warrant activities to 8 of the 26 did not tip the scale in favor of them seeking warrants.

We review these factual findings for clear error. *See United States v. Grosenheider*, 200 F.3d 321, 328 (5th Cir. 2000). Runyan contends that the district court's findings are clearly erroneous because Agent Nuckles's inclusion of a reference to his "cursory" pre-warrant review of the disks in

> one of his affidavits signals that his decision to seek the warrant was motivated by his examination of the disks. We disagree. The fact that Agent Nuckles made a passing reference to his prior illegal search activity in his warrant application is not dispositive to our determination whether he would have sought the warrant in the absence of the prior illegal searches.[7] Our review of the record reveals ample support for the district court's finding that Agent Nuckles would have sought the warrants even if he had limited his pre-warrant examination to the same disks that were examined by the private searchers.

As Agent Nuckles testified at the hearing on remand, the statements provided by Judith and Misty, along with Runyan's statement to Ranger Grubbs, provided sufficient justification for Agent Nuckles to seek a warrant to search Runyan's home and computer equipment. Moreover, seeking a warrant under such circumstances was apparently required by the investigative policies of the Customs Service. Under these circumstances, the district court's finding that Agent Nuckles would have sought both warrants even if he had never exceeded the scope of the private search is not clearly erroneous.

The second prong of the Murray inquiry asks whether the issuance of the warrant (as opposed to the decision to

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[7] This is not to say that discussion of prior illegal search activity in a warrant application is irrelevant in assessing whether the police would have sought a warrant in the absence of a prior illegal search. We simply find that, under the circumstances of the instant case, brief reference to the prior illegal search in the warrant application does not provide conclusive evidence of Agent Nuckles's motivation in seeking the warrant.

seek the warrant) was independent of any illegal search activity. As Runyan correctly points out, when a search conducted pursuant to a warrant is alleged to be an "independent source" of otherwise tainted evidence and the warrant application contains information obtained from the prior illegal search (or, as in the instant case, contains a reference to the prior illegal search), this court's task is to determine whether there would have been probable cause to support the issuance of the warrant had the "tainted" information been omitted from the application. *See United States v. Restrepo*, 966 F.2d 964, 966 (5th Cir. 1992) (agreeing that the "proper approach is to excise from the warrant affidavit those facts that were gleaned from the illegal search, and then to consider whether the affidavit's remaining information is sufficient to constitute probable cause"). This probable cause inquiry is a question of law that we review de novo. *United States v. Hassan*, 83 F.3d 693, 697 (5th Cir. 1996). In the instant case, the only information that must be stricken from Agent Nuckles's affidavits to "purge" the affidavits of any reference to the illegal pre-warrant search is a short statement in one of the affidavits indicating that Nuckles conducted a "cursory" review of the disks.[8] We find that there remains

[8] Runyan contends that Misty's testimony must be excised from the affidavits as well because her identification stemmed from the illegal searches. In our December 10 opinion we noted that the record contains conflicting testimony regarding whether Melissa Payne identified Misty from the images of Misty that were printed out from the disks or from the Polaroid photos of Misty. Because this court is bound to interpret the facts in the light most favorable to the Government when reviewing a trial court's denial of a motion to suppress, we assumed in our prior opinion that Misty was identified via the Polaroids and that her identification was independent of the illegal search activity. *Runyan*, 275 F.3d at 465-66. Runyan contends that Misty's

(Continued on following page)

ample evidence in the applications to support a finding of probable cause. This conclusion is bolstered by the district court's finding on remand that Magistrate Judge Lane would have issued the warrants even if one of the warrant applications had not contained a reference to Agent Nuckles's prior illegal search activities.[9] This finding indicates that the magistrate judge, who is more familiar with the detailed facts of this case, would have arrived at the same probable cause determination that this court reaches today.

In conclusion, we find that the searches conducted pursuant to the two warrants issued by Magistrate Judge Lane are an independent source of the evidence obtained in the illegal pre-warrant searches of the disks. This evidence was properly deemed admissible. Moreover, based on our determination that the warrants were issued

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testimony is nonetheless "tainted" by the illegal search because Darla Tibbetts (who "tentatively" identified Misty before investigators sought Melissa's assistance) identified Misty via images taken from the disks. While it is not at all clear from the record whether Tibbetts's tentative identification of Misty was based on computer images or Polaroids, this distinction is ultimately not dispositive. Misty's testimony remains "untainted" by the illegal search. Even if Tibbetts did, in fact, tentatively identify Misty from computer printouts, Tibbetts would have made the same tentative identification upon seeing the Polaroid photographs. Misty's identity would inevitably have been discovered and thus her identification is not a "tainted" product of the prior illegal search activity. *See*, e.g., *United States v. Singh*, 261 F.3d 530, 535 (5th Cir. 2001) (noting that otherwise suppressible testimony or evidence should be admitted if there is "a reasonable probability that the evidence would have been discovered from an untainted source").

[9] The district court found, based on Magistrate Judge Lane's unequivocal testimony, that he "would have issued the warrant if the phrase had not been present."

independently of the prior illegal search, we find that any additional evidence obtained pursuant to these warrants is not the "fruit of the poisonous tree" and is therefore admissible. Thus, the district court did not err in refusing to suppress any of the evidence against Runyan.[10]

III. Runyan's Sufficiency of Evidence Claims

Runyan challenges the sufficiency of the evidence supporting all four counts of conviction: sexual exploitation of a child in violation of 18 U.S.C. § 2251, distribution of child pornography in violation of 18 U.S.C. § 2252A(a)(2), receipt of child pornography in violation of 18 U.S.C. § 2252A(a)(2), and possession of child pornography in violation of 18 U.S.C. § 2252A(a)(5)(B). This court reviews a challenge to the sufficiency of the evidence supporting a conviction de novo, considering "whether . . . a rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt." *United States v. De Leon*, 170 F.3d 494, 496 (5th Cir. 1999). "All reasonable inferences from the evidence must be construed in favor of the jury verdict." *United States v. Martinez*, 975 F.2d 159,

[10] Runyan also appears to argue, albeit obliquely, that all the disks removed from his ranch by Judith should be suppressed because Judith entered Runyan's property illegally. We need not address the merits of this contention. The record contains conflicting testimony regarding whether Judith had Runyan's permission to retrieve her property from the ranch. Because we are bound to view the evidence in the light most favorable to the Government in reviewing the district court's denial of a motion to suppress, we must presume that Judith had permission to enter the ranch and retrieve her property. Accordingly, Judith's private search was not illegal under Texas law.

161 (5th Cir. 1992) (citing *Glasser v. United States*, 315 U.S. 60, 80, 86 L. Ed. 680, 62 S. Ct. 457 (1942)).

Runyan argues that the evidence was insufficient to sustain a conviction for sexual exploitation of a child because the Government failed to prove that Runyan knew the images of Misty would be transported in interstate or foreign commerce. Runyan similarly argues that the evidence was insufficient to sustain a conviction for distribution, receipt, or possession of child pornography because the Government failed to prove that any illegal image was transported in interstate commerce. We consider each of these claims in turn.

A. The Sufficiency of the Evidence Regarding Sexual Exploitation of a Child

The jury convicted Runyan of sexual exploitation of a child in violation of 18 U.S.C. § 2251, based on Runyan's conduct in photographing Misty Metcalf. Section 2251 reads, in pertinent part, as follows:

> (a) Any person who employs, uses, persuades, induces, entices, or coerces any minor to engage in . . . any sexually explicit conduct for the purpose of producing any visual depiction of such conduct, shall be punished as provided under subsection (d), if such person knows or has reason to know that such visual depiction will be transported in interstate or foreign commerce or mailed, if that visual depiction was produced using materials that have been mailed, shipped, or transported in interstate or foreign commerce by any means, including by computer, or if such

> visual depiction has actually been transported in interstate or foreign commerce or mailed.

18 U.S.C. § 2251 (2000). Runyan argues that the evidence presented at trial was insufficient to demonstrate that he "knew or had reason to know" that the images of Misty would be transported in interstate or foreign commerce.

According to Misty's testimony at trial, when Runyan initially asked her to pose for nude photographs, he explained to her that he was planning to sell the photographs to people in another country. Misty further testified that Runyan said he would use the Internet to solicit people to buy these photographs. Runyan contends that Misty's testimony is insufficient to support his conviction because such statements do not demonstrate that he "knew or had reason to know" that images of child pornography would be transported in interstate or foreign commerce. According to Runyan, a statement indicating that an individual is planning to sell images over the Internet is insufficient to establish the interstate nexus required for conviction under § 2251.

As Runyan correctly notes, this circuit has not yet decided whether an Internet transmission, in and of itself, constitutes interstate transportation sufficient to satisfy the interstate commerce element of § 2251 (i.e., the element requiring that an offender must "know[] or have reason to know that such visual depiction will be transported in interstate or foreign commerce or mailed"). In the instant case we now squarely face this question. We join the First Circuit in holding that "transmission of photographs by means of the Internet is tantamount to moving photographs across state lines and thus constitutes transportation in interstate commerce" for the

purposes of 18 U.S.C. § 2251. *United States v. Carroll*, 105 F.3d 740, 742 (1st Cir. 1997).[11]

The factual circumstances at issue in Carroll are remarkably similar to the instant case. In Carroll, the defendant's ex-wife found pornographic Polaroid photographs of the defendant's thirteen-year-old niece among his personal effects. 105 F.3d at 741. After an FBI investigation, the defendant was charged with sexual exploitation of a child in violation of 18 U.S.C. § 2251. The victim testified at trial that the defendant informed her at the time the photographs were taken that he intended to scan the images into a friend's computer and distribute them over the *Internet*. 105 F.3d at 742. The defendant was convicted and subsequently appealed, challenging the sufficiency of the evidence supporting his conviction. Like Runyan, the defendant in Carroll argued that the victim's testimony was insufficient to establish that he "knew or had reason to know" that the pictures would be transported in interstate commerce. The First Circuit disagreed, holding that the victim's testimony was sufficient

[11] While the First Circuit appears to be the only circuit court that has directly addressed this question in the context of 18 U.S.C. § 2251, a number of other circuits have agreed that transmission of material via the Internet constitutes transportation in interstate commerce in related contexts. *See*, e.g., *United States v. White*, 2 Fed. Appx. 295, 298 (4th Cir. 2001) (addressing 18 U.S.C. § 2252A); *United States v. Thomas*, 74 F.3d 701, 706-09 (6th Cir. 1996) (addressing 18 U.S.C. § 1465); *United States v. Smith*, 47 M.J. 588, 592 (N.M. Ct. Crim. App. 1997) (addressing 18 U.S.C. § 2252); see also *United States v. Campos*, 221 F.3d 1143 (10th Cir. 2000) (upholding a conviction under 18 U.S.C. § 2252 based on an Internet transmission without explicitly discussing whether Internet transmission constitutes transmission in interstate commerce).

"to sustain a finding that the [defendant] intended to transport the pornographic depictions in interstate commerce (and therefore knew that they would be so transported)." *Id.* While the Carroll court recognized that there were alternate ways that the Government could have established the interstate commerce element of the offense in that case, the court clearly indicated that the victim testimony alone was sufficient to establish the required interstate commerce connection. *Id.* (indicating that the victim's testimony, "if believed, proved the government's point" that the defendant intended to transport child pornography in interstate commerce). We similarly conclude in the instant case that Misty's testimony suffices to sustain the jury's finding that Runyan "knew or had reason to know" that the images of her would be transported in interstate commerce via the Internet.

Runyan further argues that Misty was an unreliable witness whose testimony was not credible and that her testimony thus cannot form the sole basis of his conviction for sexual exploitation of a child. While we recognize that Misty's testimony was not without its inconsistencies, Runyan's criticisms of Misty's credibility go to the weight of the evidence, not its sufficiency. In assessing the sufficiency of the evidence supporting Runyan's conviction, this court does not evaluate the weight of the evidence or the credibility of witnesses. See *United States v. Delgado*, 256 F.3d 264, 273-74 (5th Cir. 2001). Credibility assessments are squarely within the jury's domain, and we decline Runyan's invitation to second-guess the jury's assessment of Misty's testimony. Accordingly, we find that the Government presented sufficient evidence to support Runyan's conviction for sexual exploitation of a child.

B. The Sufficiency of the Evidence Regarding Distribution, Receipt, and Possession of Child Pornography

Runyan also challenges the sufficiency of the evidence supporting his convictions for distribution, receipt, and possession of child pornography under 18 U.S.C. § 2252A. Runyan contends that the Government failed to demonstrate adequately that any of the illegal images introduced at trial were "transported in interstate commerce," a required element of each of these three charges. Specifically, Runyan argues that the Government never proved that any of the particular images in question came from the Internet, rather than from purely intra-state sources. According to Runyan, the Government impermissibly relied solely on inference to establish the interstate commerce connection required under § 2252A.

In support of his argument, Runyan relies primarily on this court's decision in *United States v. Henriques*, 234 F.3d 263 (5th Cir. 2000). In that case, defendant Bart Henriques was convicted of possession of child pornography under a prior version of § 2252A that required the Government to prove possession of three or more images of child pornography. *Henriques*, 234 F.3d at 264-65. Henriques's conviction was based on exactly three images. He challenged his conviction, arguing that the evidence was insufficient to support a finding that the three images were transported in interstate commerce. *Id.* at 264. This court agreed and reversed Henriques's conviction. We noted that transport of goods through interstate commerce is an element of the crime under § 2252A, and we adopted the Tenth Circuit's holding that, when the interstate commerce element of § 2252A is established via Internet transmission, the Government must "independently link

all the images upon which a conviction is based to the Internet" in order to obtain a conviction. *Henriques*, 234 F.3d at 266 (citing in *United States v. Wilson*, 182 F.3d 737, 744 (10th Cir. 1999)).

In examining the particular images at issue in Henriques, we recognized that two of the three images in question were connected to interstate commerce by evidence introduced at trial. A witness in that case testified at trial that she observed Henriques viewing images of child pornography on the Internet, including one of the three images supporting his conviction.234 F.3d at 267. Another of the images supporting Henriques's conviction had a website address embedded on it. *Id.* While we indicated that such internal evidence of an Internet origin was most likely sufficient to "independently link" this image to interstate commerce, we ultimately concluded that there was still insufficient evidence to support Henriques's conviction because there was no evidence indicating that the third image at issue came from the Internet. We deemed the Government's proffered evidence – demonstrating that Henriques had access to the Internet, and that his computer contained pornographic material – insufficient to establish the requisite connection between the third image and interstate commerce. *Id.* at 266-67. Moreover, we indicated that the Internet link established for the first two images supporting Henriques's conviction could not be imputed to the third image because each image had to be independently linked to the *Internet*. 234 F.3d at 267.

Runyan contends that, as in Henriques, the Government in the instant case failed to "independently link" any of the images supporting his convictions for possession, receipt, and distribution of child pornography to interstate

commerce. The Government responds that a rational jury could have found that the interstate nexus was established in this case. The Government points out that Runyan admitted in his initial confession to Agent Nuckles: (1) that Runyan knew the CDs taken from his home contained child pornography that had come from the Internet, and (2) that he had received images of child pornography from the Internet by accessing news groups and viewing images. The Government further notes that both the defense expert, Chancey Green, and the Government's expert, Agent Wargo, testified at trial that some of the images on the disks found by Judith and on the hard drive of Runyan's desktop computer came from the Internet. Finally, the Government points to Runyan's statements to Misty indicating that he trafficked internationally in child pornography as further evidence that the Government sufficiently established the interstate commerce nexus underlying Runyan's convictions for distribution, receipt, and possession of child pornography.

Before delving into the substance of the parties' arguments, it merits notice that, unlike the defendant in Henriques, Runyan was charged and convicted under the current version of 18 U.S.C. § 2252A, which requires distribution, receipt, or possession of only one image in order to sustain a conviction.[12] 18 U.S.C. § 2252A reads, in pertinent part:

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[12] In certain circumstances, a defendant can raise the fact that he possessed, received, or distributed less than three images of child pornography as an affirmative defense under the current version of the statute. *See* 18 U.S.C. § 2252A(d) (2000). Runyan did not raise such a defense in the instant case. Moreover, the existence of this affirmative

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(a) Any person who –

(1) knowingly mails, or transports or ships in interstate or foreign commerce by any means, including by computer, any child pornography;

(2) knowingly receives or distributes –

(A) any child pornography that has been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer; or

(B) any material that contains child pornography that has been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer;

. . . (5) either –

(A) in the special maritime and territorial jurisdiction of the United States, or on any land or building owned by, leased to, or otherwise used by or under the control of the United States Government, or in the Indian country (as defined in section 1151), knowingly possesses any book, magazine, periodical, film, videotape, computer disk, or any other material that contains an image of child pornography; or

(B) knowingly possesses any book, magazine, periodical, film, videotape, computer disk, or any other material that contains an image of child pornography that has been mailed, or shipped or transported in interstate or foreign

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defense does not alter the nature of the interstate commerce nexus requirement under the current version of the statute.

> commerce by any means, including by computer, or that was produced using materials that have been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer, shall be punished as provided in subsection (b).

18 U.S.C. § 2252A (2000).

Runyan apparently reads Henriques to suggest that the Government must provide direct evidence (akin to the eyewitness testimony addressing the first image in Henriques) in order to provide the requisite "independent link" between an image and the Internet. This argument mischaracterizes our holding in Henriques. Henriques establishes that the Government must provide some evidence linking the specific images supporting the conviction to the Internet in order to establish an interstate commerce connection under § 2252A. *Henriques*, 234 F.3d at 266. Thus, as we indicated in Henriques, it is not enough for the Government merely to introduce evidence indicating that the defendant had Internet access and that the defendant, at some point in time, accessed or downloaded images from pornography websites or newsgroups. *Id.* at 266-67. Rather, the Government must make a specific connection between the images introduced at trial and the Internet to provide the requisite jurisdictional nexus. We did not suggest in Henriques that circumstantial evidence would be insufficient to establish such a link. Indeed, Henriques implicitly supports the notion that circumstantial evidence linking a particular image to the Internet (such as the presence of a website address embedded on the image) can be sufficient evidence of interstate transportation to support a conviction under § 2252A. *Id.* at 267 (noting that one of the three images in question "contained

a world-wide web address embedded on the image" and that "it is possible for this 'internal evidence' to support a connection to the Internet"); accord *United States v. Hilton*, 257 F.3d 50, 54-55 (1st Cir. 2001) (adopting the analysis of Henriques and concluding that "the government is not required to provide 'direct' evidence of interstate transmission," thus upholding the defendant's conviction for receipt and possession of child pornography based on expert testimony opining that the particular images at issue in that case most likely originated from the Internet).

Viewing the evidence in the instant case, as we must, in the light most favorable to the verdict, there is adequate circumstantial evidence to tie particular images of child pornography that were introduced into evidence at trial to the Internet. For example, one image obtained from the hard drive of Runyan's computer had a website address embedded on it and contained language advertising the child pornography available at that website: "All Uncensored Child Nude and Porno Lolita Pics"; "Asian Nudist and Others"; and "Ultimate Lolita Nudist Site." The website address and this advertising language provides circumstantial evidence that this image was obtained from the Internet. In addition, the Government's expert, Agent Wargo, testified at trial as to his opinion that this image came from the Internet. This evidence is sufficient to enable a rational jury to find that Runyan received and possessed an image of child pornography that was "transported in interstate commerce" within the meaning of § 2252A. Accordingly, there was sufficient evidence to support Runyan's convictions for receipt and possession of child pornography.

Runyan's conviction for distribution of child pornography is more problematic. The distribution charge against Runyan was not based on any evidence indicating that Runyan transmitted to others the images he had stored on the disks or on the hard drive of his computer. Instead, this charge was apparently based on Runyan's expressed intent to distribute via the Internet the images of Misty that he created. However, the Government has not provided sufficient evidence directly tying the images of Misty to the Internet for the purposes of the distribution charge. Misty's testimony alone is insufficient to establish the interstate commerce element of a conviction under § 2252A.

Unlike a conviction for sexual exploitation of a minor under § 2251, which requires the Government to prove that the defendant knew or had reason to know at the time that the images were created that those images "will be transported in interstate or foreign commerce or mailed," 18 U.S.C. § 2251 (2000) (emphasis added), a conviction for distribution of child pornography under § 2252A requires the Government to prove that the defendant knowingly distributed "any child pornography that has been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer" or "any material that contains child pornography that has been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer," *id.* § 2252A (emphasis added). As the language of the two sections suggests, while evidence of a defendant's intent to distribute child pornography via interstate commerce is adequate to satisfy the jurisdictional element of § 2251, *see, e.g.*, *United States v. Buculei*, 262 F.3d 322, 329 (4th Cir. 2001) (noting that § 2251's jurisdictional element limits this section's applicability to "a discrete set of

activities – defendants who plan to transport visual depictions of minors engaged in sexually explicit conduct in interstate commerce") (emphasis added), such evidence of intent appears insufficient to satisfy the jurisdictional element of § 2252A.

There was no evidence presented at trial indicating that Runyan actually disseminated the pictures of Misty to anyone, much less that he had transported these images in interstate or foreign commerce via the Internet or any other means. Nor was there any evidence presented at trial indicating that Runyan actually distributed any of the other images contained on the disks or on the hard drive of his computer by transporting these images in interstate or foreign commerce. Under these circumstances, no reasonable jury could have found: (1) that Runyan knowingly distributed child pornography or material containing child pornography; or (2) that such child pornography or material containing child pornography was mailed, shipped or transported in interstate or foreign commerce. Accordingly, we reverse the distribution count of Runyan's conviction.

IV. Runyan's Claims Based on the Wood Computer

In the course of preparing Runyan's defense, his attorneys purchased a computer from Misty's ex-boyfriend, Nathan Wood ("the Wood computer").[13] The defense

[13] Wood testified for the defense at trial. His testimony indicated that while he and Misty were dating, he often observed Misty using the computer to view and download pornography from the Internet. Wood

(Continued on following page)

retained possession of this computer for four months, apparently without investigating its contents. Shortly before trial, the defense retained an expert, Chancey Green, to analyze the computer. Green informed Runyan's attorneys that there were pornographic images on the computer depicting what he believed to be underage females. Runyan's attorneys then contacted officials from the United States Customs Service. According to the defense, these officials instructed Runyan's attorneys to turn the Wood computer over to the Customs Service. The Customs Service officials also instructed Green to destroy the "mirror image" of the Wood computer's hard drive that he had created.

Runyan contends that, from the time that his attorneys relinquished the Wood computer to the Customs Service until the time of trial, the defense was denied access to the computer. The Government, in contrast, maintains that the defense had an open invitation to examine the Wood computer and its contents while the computer was in the possession of the Customs Service. At the request of the Government, Agent Nuckles conducted an analysis of the contents of the Wood computer's hard drive. This analysis was apparently not completed until after the trial began.

Both parties agree that the Wood computer was available at trial. Indeed, the defense introduced the computer into evidence. On the second day of trial, Runyan made a motion requesting that the court "order the

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also testified that he observed Misty sending these images to others via electronic mail, claiming that the images were pictures of her.

United States to produce copies of all graphic images on [the Wood] computer, examine them in camera, and enter an order making all said images and/or computer information [available] to Defendant's counsel." Runyan alleged that this hard drive contained images of child pornography that would exculpate him.[14] On the fourth day of trial Runyan made a similar motion requesting that the court "order the United States to produce copies of all graphic images on this computer and deliver them to Defendant's counsel." The district court denied both motions.

Green testified at trial for the defense, stating that he had found images of what he believed to be underage females on the Wood computer. Agent Nuckles testified at trial that he found no images of child pornography on the Wood computer. Agent Nuckles conceded that he found "questionable" images during his analysis, but stated that he found "no five and six-year-old [child] porn images." Neither party introduced any images from the Wood computer into evidence at trial.

Subsequent to trial, Runyan's newly-retained appellate counsel requested and received from the Government a mirror image of the Wood computer's hard drive. Two additional defense experts, Dr. Hill and Dr. Andrus, then examined a sample of thirty-three images from the

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[14] Runyan's theory was that any images of child pornography found on the Wood computer would support his contentions: (1) that it was Misty, not Runyan, who sent and received images of child pornography from Runyan's computer; and (2) that Misty (with the assistance of other unknown parties) must have created the photographs of herself, mimicking the "poses" she saw in the images she downloaded onto Wood's computer.

computer. Dr. Hill concluded that eleven images in the sample were girls under age sixteen; Dr. Andrus concluded that ten images in the sample were girls under age sixteen. Runyan alleges that these images constitute exculpatory evidence because they support his theory that Misty was responsible for creating images of herself, and that it was Misty, not Runyan, who intended to distribute these images over the Internet.

A. Runyan's Claims on Direct Appeal

In his direct appeal of his criminal conviction (No. 01-10821), Runyan contends that the district court erred in refusing to order the Government to produce images from the Wood computer that are, according to Runyan, exculpatory under *Brady v. Maryland*, 373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963). Runyan similarly argues that the district court erred in refusing to conduct an in camera review of materials on the Wood computer to determine if exculpatory evidence was present. The district court denied these motions on the ground that there was no need for court-ordered production or in camera inspection because the computer was readily available to the defense at the time these motions were made during the trial.

Methods of enforcing disclosure requirements are generally left to the sound discretion of the trial court. *See United States v. Valera*, 845 F.2d 923, 927 (11th Cir. 1988). However, this court has held that, under certain circumstances, refusal to compel production or conduct an in camera review of Brady materials can be reversible error. *See, e.g., Williams v. Dutton*, 400 F.2d 797, 799-800 (5th Cir. 1968) (refusal to compel production); *United States v. Gaston*, 608 F.2d 607, 612-14 (5th Cir. 1979) (refusal to

conduct an in camera review). The district court in the instant case apparently concluded that Brady was not implicated because the images in question were not being "suppressed" by the Government. We agree.

We review a district court's Brady determinations de novo. *United States v. Dixon*, 132 F.3d 192, 199 (5th Cir. 1997). In order to establish a due process violation under Brady, a defendant must show that: (1) evidence was suppressed; (2) the suppressed evidence was favorable to the defense; and (3) the suppressed evidence was material to either guilt or punishment. 373 U.S. at 87. Evidence is material under Brady when there is a "reasonable probability" that the outcome of the trial would have been different if the suppressed evidence had been disclosed to the defendant. *United States v. Gonzales*, 121 F.3d 928, 946 (5th Cir. 1997) (citing *United States v. Bagley*, 473 U.S. 667, 682, 87 L. Ed. 2d 481, 105 S. Ct. 3375 (1985)). However, a defendant seeking merely an in camera inspection to determine whether a particular source contains Brady material "need only make a 'plausible showing' that the file will produce 'material' evidence." *United States v. Lowder*, 148 F.3d 548, 551 (5th Cir. 1998) (quoting *Pennsylvania v. Ritchie*, 480 U.S. 39, 58 n.15, 94 L. Ed. 2d 40, 107 S. Ct. 989 (1987)).

In addressing Runyan's motions to compel production and in camera review of the images on the Wood computer, we need not determine whether the images on the Wood computer were "material" under Brady and its progeny. We agree with the district court that, at the time of trial, the Wood computer was not being "suppressed." An order compelling the Government to produce images on the Wood computer (or, similarly, an order requiring production of these images for the purposes of in camera review)

would have served no purpose. As the district court correctly recognized, "the defense had full access to [the Wood] computer and its contents during the trial." Indeed, the record confirms that the defense was fully aware that the Wood computer was available for inspection at the time of trial.

Accordingly, the only effect of an order compelling production (or compelling production for the purposes of an in camera inspection) would have been to require the Government, rather than the defense, to turn on the computer and examine the images contained therein. However, Brady does not require such action by the Government. *Cf. United States v. Mulderig*, 120 F.3d 534, 541 (5th Cir. 1997) (holding that the Government's Brady obligations do not require it to "point the defense to specific documents within a larger mass of material that it has already turned over") (quoting *United States v. Mmahat*, 106 F.3d 89, 94 (5th Cir. 1997)) (internal quotations omitted). Evidence is not "suppressed" if the defendant "knows or should know of the essential facts that would enable him to take advantage of it. . . . The Government is not required, in other words, to facilitate the compilation of exculpatory material that, with some industry, defense counsel could marshal on their own." *United States v. Shoher*, 555 F. Supp. 346, 352 (S.D.N.Y. 1983) (internal citations omitted); *see also* Mulderig, 120 F.3d at 541 ("When information is fully available to a defendant at the time of his trial and his only reason for not obtaining and presenting the evidence to the court is his lack of reasonable diligence, the defendant has no Brady claim.")

(quoting *United States v. Marrero*, 904 F.2d 251, 261 (5th Cir. 1990) (internal quotations omitted)).[15] Because there was no Government "suppression" of the images on the Wood computer at the time of trial, the district court properly denied Runyan's motions to compel production of these images.

B. Runyan's Claims in His Motion for New Trial

A more difficult question is presented by Runyan's motion for new trial based on newly-discovered evidence. Runyan argues that the defense was denied access to the Wood computer during the time period between the Customs Service's acquisition of the computer and the trial. Runyan contends that because he was prevented from accessing the Wood computer during this time period, he was unable to make a meaningful analysis of the potentially exculpatory images on the computer. Thus, according to Runyan, his post-trial expert analysis of the images from the Wood computer, which confirms that some of these images did depict individuals under the age of sixteen, is "newly-discovered evidence" that he was unable to obtain prior to trial due to the Government's pre-trial suppression of the computer.

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[15] Indeed, remarkably little "diligence" would have been required of the defense in the instant case. The record reveals that all of the relevant images and video clips from the Wood computer fit on a single CD. Thus, as the district court found, "it would not [have taken] long at all to view all the" relevant files from the Wood computer, even during the course of a busy trial.

Even assuming, arguendo, that that [sic] the Government withheld the Wood computer prior to trial and that the results of the defense's post-trial analysis can thus appropriately be deemed "newly-discovered evidence," a new trial is not warranted. The defense's post-trial analysis of the images from the Wood computer fails to satisfy Brady's materiality requirement.

This court reviews a district court's denial of a motion for new trial for abuse of discretion. *United States v. Jaramillo*, 42 F.3d 920, 924 (5th Cir. 1995). However, when the newly-discovered evidence is alleged to be exculpatory evidence that the Government withheld in violation of Brady, we review any Brady determinations de novo. *United States v. Gonzales*, 121 F.3d 928, 946 (5th Cir. 1997). As a general rule, to obtain a new trial based on newly-discovered evidence, a defendant must demonstrate that: (1) the evidence was discovered after trial; (2) the failure to discover the evidence was not due to the defendant's lack of diligence; (3) the evidence is not merely cumulative or impeaching; (4) the evidence is material; and (5) a new trial would probably produce a new result. *United States v. Williams*, 985 F.2d 749, 757 (5th Cir. 1993). However, when a motion for new trial based on newly-discovered evidence raises a Brady claim, this court instead applies the three-prong Brady test to determine whether a new trial is appropriate. *See, e.g., Gonzales*, 121 F.3d at 946 (applying the three prong Brady test in assessing a motion for new trial based on an alleged Brady violation); accord *United States v. Conley*, 249 F.3d 38, 45 (1st Cir. 2001) (noting that the three-part Brady test – rather than the five part test governing motions for new trial – is applicable "where a defendant claims that the newly-discovered evidence should have been produced

under Brady"); *United States v. Quintanilla*, 193 F.3d 1139, 1149 n.10 (10th Cir. 1999) ("Evaluation of a Brady claim asserted in a motion for a new trial involves an application of the three [Brady] elements identified above, and not the five-prong . . . test utilized in typical newly discovered evidence claims.").

As noted above, to establish a due process violation under Brady, a defendant must show that: (1) evidence was suppressed; (2) the suppressed evidence was favorable to the defense; and (3) the suppressed evidence was material to either guilt or punishment. 373 U.S. at 87. Evidence is material under Brady when there is a "reasonable probability" that the outcome of the trial would have been different if the evidence had been disclosed to the defendant. *See Bagley*, 473 U.S. at 682. A "reasonable probability" is established when the failure to disclose the suppressed evidence "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Kyles v. Whitley*, 514 U.S. 419, 435, 131 L. Ed. 2d 490, 115 S. Ct. 1555 (1995). As we noted in *Gonzales*, this standard does not require a defendant to establish that he would have been acquitted had the evidence been disclosed. 121 F.3d at 946. However, the defendant "must establish that the suppression of exculpatory evidence by the government 'undermines confidence in the outcome of the trial.'" *Id.* (quoting *Kyles*, 514 U.S. at 434).

It merits emphasis that the evidence in question in the instant case (i.e., the evidence that the Government allegedly prevented the defense from accessing) is not the Wood computer or even the images contained on the Wood computer. Rather, the "newly discovered" Brady evidence is the expert analysis of these images that the defense was

able to obtain after trial, but was allegedly unable to obtain prior to trial. Thus, this court's task is to determine whether the availability of such expert analysis at trial would have placed "the whole case in such a different light as to undermine confidence in the verdict." Kyles, 514 U.S. at 435.

As noted above, Runyan's attorneys initially hired Chancey Green to examine the Wood computer prior to the time that the defense relinquished the computer to the Customs Service. Although Green was apparently unable to conduct a complete analysis of the images on the Wood computer, he did testify at trial that he saw images of what he believed to be child pornography (specifically, images of "young girls") on the computer. Agent Nuckles also testified at trial regarding the contents of the Wood computer, indicating that he found "no evidence of actual child pornography." However, Nuckles conceded that there were some "questionable" images on the Wood computer. In light of this testimony, it is clear that both the trial court and the jury were fully aware that the Wood computer contained "borderline" images that might have constituted child pornography. As the district court correctly noted, Runyan's post-trial expert analysis "only verified this information."

Runyan contends that this verification is nonetheless "material" within the meaning of Brady because such testimony would have bolstered Runyan's theory that Misty was responsible for creating the pornographic images of herself. However, in light of the compelling evidence that Runyan was personally involved in taking

the pornographic photographs of Misty,[16] the defense's alternate theory explaining the origin of these images is extremely weak.[17] Under the circumstances of this case, we cannot say that the inclusion of additional evidence at trial providing indirect support (if any) for this demonstrably weak defensive theory would have placed the case in such a different light as to undermine confidence in the verdict. Cf. *Wright v. United States*, 559 F. Supp. 1139, 1146 (E.D.N.Y. 1983) (Brady . . . does not require the government to anticipate all possible defenses and provide the defendant with otherwise irrelevant information to bolster one possible factual theory, particularly where . . . the theory itself . . . is demonstrably implausible."), aff'd, 732 F.2d 1048 (2d Cir. 1984). We find that there is no reasonable probability that the outcome of the trial would have

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[16] Even apart from Misty's testimony – which the jury apparently credited – there is ample evidence in the record indicating that Runyan was involved in photographing Misty. It is uncontroverted that the pornographic photographs of Misty were taken inside Runyan's home and his place of business. In addition, as previously noted, the Polaroid photographs of Misty were found in Runyan's barn and digitized images of Misty were found on Runyan's computer. Finally, Judith testified at trial that she recognized Runyan's hand in one of the photographs of Misty.

[17] In addition, the presence of child pornography on Nathan Wood's computer provides only indirect support for this defensive theory. No images of Misty were found on Wood's computer. The defense explained at oral argument that the presence of child pornography on Wood's computer nonetheless supports Runyan's theory that Misty was responsible for creating pornographic images of herself. Specifically, Runyan argues that, because the poses in the pictures found on the Wood computer were similar to the poses in the images of Misty, Misty must have learned techniques for pornographic modeling from the images she viewed on the Wood computer.

been different had Runyan been able to present expert analysis of the images on the Wood computer.

Runyan also contends that the district court erred in denying his motion for a new trial without conducting an evidentiary hearing. This court recognizes that a district court may rule on a motion for new trial without conducting an evidentiary hearing. *See United States v. Blackburn*, 9 F.3d 353, 358 (5th Cir. 1993). Moreover, "the decision to hold a hearing rests within the sound discretion of the trial court." *Id.* In the instant case, the trial court was well aware of the details of the parties' dispute regarding the Wood computer because Runyan's motion to compel production and Runyan's motion for in camera review involved essentially the same issues. The only new information relevant to this dispute at the time of the motion for new trial was the defense's post-trial expert analysis of the images contained on the Wood computer. The district court determined that it could adequately assess the relevance of these two reports without the assistance of an evidentiary hearing. We cannot conclude that this determination was an abuse of the district court's discretion.

V. Runyan's Due Process Claim

Runyan contends that the district court erred in overruling his objection to testimony (solicited by the Government) indicating that Runyan refused to consent to a police search of his desktop computer. Runyan argues that the Government, in soliciting this testimony, attempted to use Runyan's invocation of his constitutional rights as evidence of guilt, in violation of the due process clause of the Fifth Amendment. The Government responds

that the district court's admission of this testimony was not erroneous because Runyan "invited" this testimony by suggesting: (1) that he had willingly consented to other searches; (2) that Agent Nuckles performed an inadequate investigation; and (3) that the desktop computer was tampered with while Runyan was out-of-town on business. The Government further contends that, even if the district court acted erroneously in overruling Runyan's objection, this testimony had no effect on the outcome of the proceedings.

This court ordinarily analyzes due process claims alleging improper comment on a defendant's invocation of constitutional rights under the harmless error doctrine, determining whether the improper comment was harmless beyond a reasonable doubt. *See, e.g., United States v. Moreno*, 185 F.3d 465, 472 (5th Cir. 1999) (improper comment on a defendant's invocation of his right to counsel); *Richardson v. Lucas*, 741 F.2d 753, 755 (5th Cir. 1984) (improper comment on a defendant's refusal to testify). In the instant case, the Government contends that Runyan did not raise this constitutional objection to Agent Nuckles's testimony at trial and that plain error analysis is therefore applicable. In support of this contention, the Government points out that Runyan's counsel objected to this testimony at the time it was presented only on the ground that it was hearsay. It appears from the record, however, that Runyan's counsel attempted to object to this line of questioning on constitutional grounds prior to the time that the testimony was elicited, and that the trial court indicated the court would not be receptive to such an objection. Nonetheless, we need not decide whether this objection was properly raised at trial because even under the more defendant-friendly "harmless error" standard,

Runyan fails to demonstrate that admission of Agent Nuckles's testimony constitutes reversible error.

This circuit has not directly addressed the question whether a prosecutor commits constitutional error by invoking a defendant's refusal to consent to a warrantless search to support an inference of guilt. However, the circuit courts that have directly addressed this question have unanimously held that a defendant's refusal to consent to a warrantless search may not be presented as evidence of guilt. *See, e.g., United States v. Moreno*, 233 F.3d 937, 940-41 (7th Cir. 2000); *United States v. Dozal*, 173 F.3d 787, 794 (10th Cir. 1999); *United States v. Thame*, 846 F.2d 200, 205-08 (3d Cir. 1988); *United States v. Prescott*, 581 F.2d 1343, 1351-52 (9th Cir. 1978); but cf. *United States v. McNatt*, 931 F.2d 251, 256-57 (4th Cir. 1991) (questioning whether a defendant's invocation of his or her Fourth Amendment rights by refusing to consent to a warrantless search is the constitutional equivalent of a defendant's invocation of his or her right to remain silent under the Fifth Amendment, but not reaching the issue). For the purposes of this appeal, we assume without deciding that it would be error of constitutional magnitude for a trial court to permit a prosecutor to comment on (or present testimony regarding) a defendant's refusal to consent to a warrantless search to support an inference of guilt.[18] Nonetheless, we find that under the circumstances of this case, this error was harmless.

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[18] We note that reference to a defendant's refusal to consent to a warrantless search may be admissible for purposes other than to support an inference of guilt. *See, e.g., Dozal*, 173 F.3d at 794 (finding such evidence admissible to establish the defendant's dominion and

(Continued on following page)

Runyan's refusal to consent to a police search of his desktop computer arose only once during the course of Agent Nuckles's testimony. The jury heard the following exchange:

> Q: Were you aware during your investigation in this case that prior to the execution of the search warrant of the desktop computer, that this defendant was asked for consent to search it?
>
> A: Yes, I was.
>
> . . . Q: Did this defendant give consent for law enforcement to search the desktop computer?
>
> A: No, he did not.
>
> Q: However, he did give consent to search other places, correct?
>
> A: Yes, he did.

The line of questioning then shifted to other matters. The prosecution neither commented on Runyan's refusal to consent to a warrantless search, nor asked the jury to draw any inferences from this refusal. Indeed, Runyan's refusal to consent to the search was not mentioned at any other time during the trial. Thus, the record reveals that the offending statement was merely an isolated reference and that Government did not focus on or highlight

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control over the property subject to the search). At least one court has also held that such testimony may be admissible under certain circumstances if "invited" by the defendant's trial strategy. *See McNatt*, 931 F.2d at 256-58 (finding that testimony regarding the defendant's refusal to consent to a search of his vehicle was "invited" by his suggestion at trial that the arresting officer "framed" him by planting drugs in the defendant's truck).

Runyan's refusal to consent to the search. This suggests that the error was harmless. Cf. *United States v. Griffith*, 118 F.3d 318, 325 (5th Cir. 1997) (recognizing that two of the relevant factors in assessing whether a prosecutor's comment on a defendant's failure to testify can be harmless error are: (1) whether the comment was an isolated incident and (2) whether the prosecution "focused on" or "highlighted" the refusal to testify) (citing *United States v. Shaw*, 701 F.2d 367, 383 (5th Cir. 1983)).

Moreover, the evidence supporting Runyan's conviction for possession and receipt of child pornography is very strong. Images of child pornography (often images of the same children or even identical images) were found on Runyan's desktop computer, on the disks removed from the ranch by Judith, and on a backup disk found during the warrant-authorized search of Runyan's home. In addition, evidence of previous access to child pornography websites was found on Runyan's desktop computer and on a laptop computer that Runyan previously owned that he gave to his stepdaughter, Rickie, when she started college. Strong evidence of guilt can render the admission of evidence regarding a defendant's refusal to consent to a warrantless search "harmless." *See Moreno*, 233 F.3d at 941; *McNatt*, 931 F.2d at 258; cf. *United States v. Valley*, 928 F.2d 130, 135 (5th Cir. 1991) (finding that overwhelming evidence of guilt can render "harmless" a prosecutor's comment on the defendant's refusal to testify). Under these circumstances, we can safely say that it is clear beyond a reasonable doubt that the jury would have returned a verdict of guilty even if the Government had never asked Agent Nuckles about Runyan's refusal to consent to a police search of his desktop computer. *See McNatt*, 931 F.2d at 258. Because we find that the alleged

constitutional error "did not contribute to the verdict obtained," this error was harmless and the jury's verdict should be upheld. *Valley*, 928 F.2d at 135 (quoting *Chapman v. California*, 386 U.S. 18, 24, 17 L. Ed. 2d 705, 87 S. Ct. 824 (1967)).

VI. Runyan's Sentencing Claim

Runyan's final claim of error alleges that he was incorrectly sentenced. The district court grouped three of Runyan's four counts of conviction. Count one (sexual exploitation of a child) was considered by itself, while the three remaining counts (receipt, distribution, and possession of child pornography) were grouped together. In the sentence calculation for the group of offenses, Runyan received a five-level enhancement for "engaging in a pattern of activity involving . . . sexual exploitation of a minor." Accordingly, Runyan contends that his exploitation offense was, in effect, "double counted." Such "double counting" is contrary to Section 3D1.2(c) of the Sentencing Guidelines, which provides that counts of conviction should be grouped "when one of the counts embodies conduct that is treated as a specific offense characteristic in, or other adjustment to, the guideline applicable to another of the counts." U.S. Sentencing Guidelines Manual § 3D1.2(c) (1998).

This "double counting" increased Runyan's sentence. As determined in the presentence report ("PSR"),[19] the adjusted offense level for sexual exploitation of a minor was 33. The adjusted offense level for the grouped offenses

[19] The district court adopted the factual findings and guideline application from the PSR.

(receipt, distribution, and possession of child pornography) was 37. Pursuant to Section 3D1.3(a), this group offense level was calculated based on the distribution charge, the most serious of the three counts comprising this group.[20]

Because Runyan was convicted of multiple counts that were grouped separately, the PSR calculated Runyan's combined offense level under Section 3D1.4. *See Id.* § 3D1.4. Pursuant to the formula provided in this section, the greater of Runyan's offense levels (i.e., 37) was increased by two for a combined offense level of 39. This offense level resulted in a total punishment range of 262-327 months. Had the counts of conviction been properly grouped by the district court into a single group, this two-level increase under Section 3D1.4 would not have applied. Thus, Runyan's offense level would have been 37, corresponding to a total punishment range of 210-262 months.

In addition, because the total punishment range that was calculated based on the combined offense level of 39 (i.e., 262-327 months) exceeded the statutory maximum for any of the counts involved, the district court imposed Runyan's sentences consecutively rather than concurrently, pursuant to Section 5G1.2(d), to achieve the total sentence of 300 months.[21] Had all four counts of conviction

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[20] Section 3D1.3(a) reads: "In the case of counts grouped together pursuant to § 3D1.2(a)-(c), the offense level applicable to a Group is the offense level, determined in accordance with Chapter Two and Parts A, B, and C of Chapter Three, for the most serious of the counts comprising the Group, i.e., the highest offense level of the counts in the Group." U.S. Sentencing Guidelines Manual § 3D1.3(a) (1998).

[21] Section 5G1.2(d) reads: "If the sentence imposed on the count carrying the highest statutory maximum is less than the total punishment, then the sentence imposed on one or more of the other counts

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been grouped together, the sentence on the count carrying the highest statutory maximum, (i.e., sexual exploitation of a child, which carries a statutory maximum of 240 months) would have been adequate to achieve the total punishment range for an offense level of 37 (i.e., 210-262 months). Accordingly, Runyan's sentences for his other counts of conviction would have run concurrently with the sentence for sexual exploitation, rather than consecutively, pursuant to Section 5G1.2(c).[22]

Thus, because the district court's improper grouping of the counts of conviction affects Runyan's substantial rights, he is entitled to resentencing. We note that resentencing is needed not only to correct this improper grouping determination but also to account for this court's reversal of Runyan's conviction for distribution of child pornography. Accordingly, we remand to the district court for resentencing consistent with this opinion.

VII. Conclusion

For the foregoing reasons, we AFFIRM the district court's denial of Runyan's motion for a new trial (No. 01-11207). In Runyan's direct appeal of his conviction (No.

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shall run consecutively, but only to the extent necessary to produce a combined sentence equal to the total punishment. In all other respects, sentences on all counts shall run concurrently, except to the extent otherwise required by law." U.S. Sentencing Guidelines Manual § 5.2(d) (1998).

[22] Section 5G1.2(c) reads: "If the sentence imposed on the count carrying the highest statutory maximum is adequate to achieve the total punishment, then the sentences on all counts shall run concurrently, except to the extent otherwise required by law." U.S. Sentencing Guidelines Manual § 5G1.2(c) (1998).

00-10821), we AFFIRM Runyan's convictions for sexual exploitation of a child, receipt of child pornography, and possession of child pornography. However, we REVERSE Runyan's conviction for distribution of child pornography and VACATE Runyan's sentence. Accordingly, we REMAND action No. 00-10821 to the district court for entry of judgment and resentencing consistent with this opinion.

APPENDIX B

UNITED STATES OF AMERICA, Plaintiff-Appellee v. ROBERT BEAM RUNYAN, Defendant-Appellant; UNITED STATES OF AMERICA, Plaintiff-Appellee v. ROBERT BEAM RUNYAN, Defendant-Appellant

No. 00-10821, No. 01-11207

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

275 F.3d 449; 2001 U.S. App. LEXIS 26310

December 10, 2001, Decided

COUNSEL:

For UNITED STATES OF AMERICA, Plaintiff-Appellee (00-10821, 01-11207): Chad Eugene Meachum, US Attorney's Office, Northern District of Texas, Dallas, TX.

For ROBERT BEAM RUNYAN, Defendant-Appellant (00-10821, 01-11207): Terri Raye Zimmermann Jacobs, Zimmermann & Lavine, Houston, TX. Jack B Zimmermann, Zimmermann & Lavine, Houston, TX.

For ROBERT BEAM RUNYAN, Defendant-Appellant (00-10821): J W Johnson, Johnson Law Office, San Angelo, TX.

JUDGES:
Before KING, Chief Judge, and JOLLY and BENAVIDES, Circuit Judges.

OPINION BY:
KING

OPINION:
KING, Chief Judge:

Defendant-Appellant Robert Beam Runyan was convicted of sexual exploitation of children in violation of

18 U.S.C. § 2251 and of distribution, receipt, and possession of child pornography in violation of 18 U.S.C. § 2252A. In two separate actions, Runyan appeals his conviction (No. 00-10821) and the district court's denial of his post-trial motion for a new trial (No. 01-11207). On September 24, 2001, we consolidated these two cases for the purposes of appeal. In challenging his conviction, Runyan asserts (among other claims) that the district court erred in admitting evidence obtained pursuant to an unlawful pre-warrant search by law enforcement officials. We hold that portions of the pre-warrant search violated the Fourth Amendment. Accordingly, we REMAND No. 00-10821 to the district court for further findings of fact addressing whether the search warrants would have been sought and issued in the absence of the Fourth Amendment violation. We do not reach any of the other issues raised in No. 00-10821 or any of the issues raised in No. 01-11207 at this time.

I. Factual and Procedural Background

Defendant Robert Runyan lived on a ranch outside Santa Anna, Texas, where he owned and operated Gammon Technologies, a computer repair and service company, from 1990 to 1998. During this time period, Runyan employed a number of local junior high and high school students to perform odd jobs at the ranch and to perform administrative tasks for Gammon Technologies.

Runyan was married to Judith Runyan ("Judith"), who has a daughter, Rickie, from a previous relationship. In January 1999, Judith left Runyan and moved in with a boyfriend in Brownwood. Runyan subsequently filed for divorce.

In June 1999, Judith made several trips to the ranch to retrieve items that she contends were her personal property. She was accompanied at different times by Rickie and other friends. Judith was aware that Runyan was not present at the ranch at these times. She was not aware that after their separation, Runyan had secured the gated entrance to the ranch with a chain and lock. Runyan had also changed the locks on the house and the barn and installed surveillance cameras on the property.

On June 17, Judith and Rickie climbed over the fence surrounding the ranch, looked through a window of the ranch house, and saw that Judith's belongings were inside. On June 18, Judith, Rickie, and a friend, Casey Giles, returned to the ranch house (again by climbing the fence surrounding the ranch) and entered the house through a breakfast-room window. After searching through the house for Judith's belongings, they entered the barn next to the house, also by climbing through a window. In the barn, Giles opened a black duffel bag and discovered that it contained pornography, compact disks ("CDs") and computer disks, a Polaroid camera with film, a vibrator, and Polaroid pictures of two individuals, one of whom appeared to be a very young teenager. Under the black bag were two waterproof ammunition boxes containing more pornography. Judith took the black bag back to her Brownwood residence.

Later that day, Judith and six of her friends reentered Runyan's ranch, this time by cutting the chain on the gate with bolt cutters. For the remainder of the day on June 18 and throughout the day on June 19 they removed items identified by Judith as belonging to her. During their search of the ranch house they found a desktop computer that Judith claimed was hers, surrounded by 3.5 inch

floppy disks, CDs, and ZIP disks.[1] Judith asked one of her friends, Brandie Epp ("Brandie"), to dismantle the desktop computer and to take it to Judith's Brownwood residence and reassemble it there. In addition to the computer, Brandie took the disks that were lying on the floor surrounding the computer. After reassembling the computer, Brandie viewed approximately twenty of the CDs and floppy disks that had been removed from the ranch and found that they contained images of child pornography. Brandie did not view any of the images on the ZIP disks because the necessary hardware was not connected. After viewing the images, Brandie contacted the sheriff's department. A deputy subsequently arrived, and Brandie turned over twenty-two CDs, ten ZIP disks, and eleven floppy disks to the deputy.

Over the next few weeks, Judith turned over various items found at the Runyan ranch to different law enforcement agencies. She provided the sheriff's department with additional CDs of child pornography and she gave the Santa Anna Chief of Police a 3.5 inch diskette containing child pornography. Judith also called Texas Ranger Bobby Grubbs ("Ranger Grubbs") and turned over to him the black duffel bag and pornographic materials removed from the ammunition boxes in Runyan's barn. At subsequent meetings with Ranger Grubbs on June 28 and July 7, Judith provided him with two additional disks and with Polaroid photographs that she had removed from the

[1] This opinion will refer to the 3.5 inch floppy disks, the compact disks, and the ZIP disks collectively as "the disks."

ranch. At some point during this time period, Judith also turned over the desktop computer to Ranger Grubbs.[2]

Ranger Grubbs viewed some of the disks delivered by Judith on his computer. He observed images of child pornography. On June 24, 1999, the Coleman County District Attorney went to the Sheriff's office and viewed several images as well. At this time, several of the images were printed out on a color printer and shown to members of the District Attorney's staff. An investigator in the District Attorney's office, Darla Tibbetts, tentatively identified the subject photographed in one of the images. An intern working for the District Attorney's office, Melissa Payne, was then brought to the sheriff's office to assist with the identification. She positively identified the girl in the pictures as Misty Metcalf ("Misty"), a former high school classmate.[3]

On June 28, 1999, upon learning that he was a potential suspect, Runyan went to meet with Ranger Grubbs. At this meeting, after he had been given Miranda warnings, Runyan stated that he found a bag of pornography at a rest stop. Runyan stated further that the bag contained CDs and other items, including a vibrator. He admitted that he viewed the materials in the bag and that, out of

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[2] It is unclear from the record when this transfer took place.

[3] There is conflicting testimony in the record regarding whether Payne was shown Polaroid photographs or computer printouts of Misty.

curiosity, he used his computer to view child pornography available on the Internet.[4]

On July 7, 1999, Customs Service Special Agent Rick Nuckles ("Agent Nuckles") became involved in the investigation. While at the District Attorney's office on an unrelated matter, Agent Nuckles observed agents involved in the Runyan investigation viewing images of child pornography and stated his willingness to work on the case. He was provided with all of the investigative reports, statements, and physical evidence that Judith had turned over, including the desktop computer and the disks. Agent Nuckles then performed an analysis on every piece of evidence he had received, copying the materials onto blank CDs. He examined several images from each disk and CD, including the ZIP disks. Agent Nuckles found two images of Misty, apparently taken with a digital camera or taken with a Polaroid camera and then scanned into a computer.

Also on July 7, Tibbetts and Ranger Grubbs interviewed a number of local young people, including Misty. Misty stated that Runyan hired her when she was a young teenager to perform odd jobs around his ranch and to iron clothes for him. She said that he approached her when she was fifteen about posing for nude photographs. Misty told Tibbetts that Runyan had taken sexually explicit photographs of her on numerous occasions when she was between the ages of fifteen and seventeen. She reported that Runyan had sometimes paid her approximately five

[4] However, Runyan maintains that he never uploaded or downloaded any images containing child pornography from the Internet at these times.

dollars per photographic session and that he had promised her more money once he sold the pictures over the Internet to customers in Japan.

Agent Nuckles then filed two applications for federal search warrants, supported by his own affidavits. The first application sought a warrant to search the desktop computer and all the disks for files containing illicit images. The second application sought a warrant to search Runyan's ranch house for any and all computers, computer hardware, software, and devices. The affidavits supporting these applications included statements made by Misty and Judith to Ranger Grubbs as well as information from Runyan's voluntary statement to Ranger Grubbs. In addition, one of the affidavits also contained a statement indicating that Ranger Grubbs had conducted a "cursory" review of the computer storage media. A magistrate judge issued both warrants, and the search of Runyan's ranch house resulted in the discovery of a computer backup tape that contained one picture of child pornography.

On October 13, 1999, Runyan was indicted on six counts of child pornography charges. Runyan filed three separate motions to suppress the evidence against him, primarily contending that the pre-warrant searches of the disks conducted by the various law enforcement officials involved in the investigation violated his Fourth Amendment rights. Consequently, Runyan argued, any evidence directly or indirectly obtained from these unlawful searches should be suppressed.

The trial court held a hearing on Runyan's motions to suppress on April 20, 2000. At the close of the hearing, the trial court denied the motions, finding that the pre-warrant police searches did not violate Runyan's Fourth

Amendment rights because the police did not exceed the scope of the private search conducted by Judith and her companions. The trial court further found that the affidavits were sufficient to show probable cause to search both the disks and Runyan's residence and that the affidavits did not contain any material misrepresentations, omissions, or stale information that would negate the magistrate judge's finding of probable cause.

At trial, Runyan's primary defense strategy was to discredit Misty and to suggest to the jury that it was Misty, not Runyan, who owned the child pornography that was found on the ranch. Runyan also suggested to the jury that it was Misty's boyfriend, Nathan Wood ("Nathan"), not Runyan, who had taken the nude photographs of her at Runyan's ranch and at Runyan's office in town while Runyan was traveling for extended periods.

On April 21, 2000, a jury convicted Runyan of four counts:[5] Count 1 – sexual exploitation of children in violation of 18 U.S.C. § 2251; Count 3 – distribution of child pornography in violation of 18 U.S.C. § 2252A (a)(2); Count 4 – receipt of child pornography in violation of 18 U.S.C. § 2252A (a)(2); and Count 5 – possession of child pornography in violation of § 2252A (a)(5)(B). On July 28, 2000, the district court sentenced Runyan to 240 months on Count 1; 60 months on Count 3, to be served consecutively to Count 1; and 180 months on Counts 4 and 5, to run concurrently with the sentence imposed on Count 1, for a total imprisonment of 300 months. In addition, the

[5] Two counts were dismissed prior to trial.

district court imposed a three-year term of supervised release and mandatory special assessments totaling $ 400.

Runyan timely appealed his convictions and his sentence, contending that: (1) the trial court erred in failing to suppress the evidence obtained directly and indirectly from the pre-warrant police searches; (2) there was insufficient evidence introduced at trial to support the interstate commerce element of each of the four charges; (3) the trial court erred in refusing to order the government to produce Nathan's computer and in refusing to conduct an in camera review of evidence on Nathan's computer that Runyan contends was exculpatory; (4) the trial court erred in admitting evidence that Runyan refused to consent to the search of the desktop computer; and (5) the trial court erred in not grouping all the counts of his conviction in the sentencing determination.[6] While that appeal was pending before this court, Runyan filed a motion for new trial based on newly discovered evidence in the district court, alleging that Nathan's computer contained exculpatory evidence that the government withheld prior to trial. The district court denied this motion on September 7, 2001, and Runyan timely appealed to this court. We consolidated Runyan's two actions for the purposes of appeal on September 24, 2001. Because we find that a limited remand to the district court is necessary to resolve one of Runyan's Fourth Amendment claims, we do not reach any of his other claims at this time.

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[6] The government concedes that Runyan was incorrectly sentenced when the trial court did not group the counts of his conviction.

II. Runyan's Fourth Amendment Claims

Runyan argues that the trial court erred in refusing to suppress evidence against him that was obtained in violation of the Fourth Amendment. He seeks to suppress two categories of evidence: (1) evidence obtained as a result of pre-warrant searches by state and federal law enforcement officials; and (2) evidence obtained pursuant to the search warrants, which were based on the evidence in category one.[7] Runyan argues that state and federal officials' warrantless examination of the tangible materials (including the disks) turned over by Judith was a "search" that violated the Fourth Amendment. According to Runyan, any information that the police[8] obtained as a result of that examination – including testimony of any witnesses identified through the tangible materials – is the "fruit of the poisonous tree" and should be suppressed. Runyan further argues that the magistrate judge would not have issued the warrant permitting customs officials to search his ranch and his computers if Agent Nuckles's affidavit had not contained testimony and evidence that originated in the allegedly unlawful pre-warrant searches. Thus, according to Runyan, evidence seized pursuant to the warrant is also "tainted" by the pre-warrant Fourth Amendment violations and should be suppressed.

"In reviewing the denial of a motion to suppress evidence under the Fourth Amendment, we review the district court's factual findings for clear error and its

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[7] We address only the first of these claims in this opinion.

[8] We use the term "police" generically to refer to all of the state and federal law enforcement officials involved in this case.

conclusions regarding the constitutionality of a warrantless search de novo." *United States v. Vega*, 221 F.3d 789, 795 (5th Cir. 2000) (internal quotations omitted). We view the facts underlying the suppression determination in the light most favorable to the prevailing party, which in this case is the government. *United States v. Howard*, 106 F.3d 70, 73 (5th Cir. 1997). It is the defendant's burden to prove a Fourth Amendment violation by a preponderance of the evidence. *United States v. Riazco*, 91 F.3d 752, 754 (5th Cir. 1996). Once the defendant proves a Fourth Amendment violation, the burden shifts to the government to demonstrate why the exclusionary rule should not apply to the fruits of the illegal search or seizure. *United States v. Houltin*, 566 F.2d 1027, 1031 (5th Cir. 1978).

The Pre-Warrant Investigation

The Fourth Amendment protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. CONST. amend. IV. The Fourth Amendment proscribes only governmental action – it is "wholly inapplicable 'to a search or seizure, even an unreasonable one, effected by a private individual not acting as an agent of the Government or with the participation or knowledge of any government official.'" *United States v. Jacobsen*, 466 U.S. 109, 113, 80 L. Ed. 2d 85, 104 S. Ct. 1652 (1984) (quoting *Walter v. United States*, 447 U.S. 649, 662, 65 L. Ed. 2d 410, 100 S. Ct. 2395 (1980) (Blackmun, J., dissenting)). Runyan makes no attempt to demonstrate that Judith and her companions were acting under the color of government authority when they searched the ranch and the computer storage materials. Runyan's contention is that the police's

subsequent review of the materials removed from the ranch was a "search" under the Fourth Amendment.

1. Was there a "search?"

In *Katz v. United States*, 389 U.S. 347, 19 L. Ed. 2d 576, 88 S. Ct. 507 (1967), the Supreme Court established that a "search" occurs for Fourth Amendment purposes when the government violates a subjective expectation of privacy that society considers objectively reasonable.[9] *See id.* at 361 (Harlan, J., concurring); *see also California v. Ciraolo*, 476 U.S. 207, 211, 90 L. Ed. 2d 210, 106 S. Ct. 1809 (1986) (adopting the test proposed in Harlan's *Katz* concurrence); *Kyllo*, 121 S. Ct. at 2042-43 (recognizing the continuing vitality of the *Katz* inquiry).

This court has elaborated on the factors relevant to a *Katz* inquiry. In *United States v. Cardoza-Hinojosa*, 140 F.3d 610, 615 (5th Cir. 1998), we indicated that whether an interest is protected by the Fourth Amendment depends on five factors: (1) "whether the defendant has a [property or] possessory interest in the thing seized or the place searched," (2) "whether he has the right to exclude others from that place," (3) "whether he has exhibited a subjective expectation of privacy that it would remain free from

[9] The *Katz* inquiry has traditionally been conceptualized as a two-part test, instructing courts to determine (1) whether the individual challenging the investigative activity had a subjective expectation of privacy and (2) whether society was prepared to recognize that expectation of privacy as objectively reasonable. However, many modern courts, including the Supreme Court in its most recent discussion of *Katz*, have collapsed this two-part test into a single inquiry. *See Kyllo v. United States*, 533 U.S. 27, 150 L. Ed. 2d 94, 121 S. Ct. 2038, 2042-43 (2001).

governmental intrusion," (4) "whether he took normal precautions to maintain privacy," and (5) "whether he was legitimately on the premises." *Id.* (quoting *United States v. Ibarra*, 948 F.2d 903, 906 (5th Cir. 1991)).

We recently indicated in *Kee v. City of Rowlett, Texas*, 247 F.3d 206 (5th Cir. 2001) that the *Cardoza-Hinojosa* factors, "while appropriate to determine the expectation of privacy in the context of searches of physical real property," cannot necessarily be applied to other types of searches without modification. *Id.* at 212-13. In *Kee* – which involved a search conducted via an electronic listening device – we determined that it was appropriate to analyze only the two *Cardoza-Hinojosa* factors most applicable to electronic surveillance (i.e., whether the defendant had a subjective expectation of privacy in his conversations and whether he took normal precautions to maintain this privacy). *See id* 247 F.3d at 213. Similarly, in the instant case – which involves a search of personal property rather than real property – we find that the first, third, and fourth *Cardoza-Hinojosa* factors are most directly applicable and should be dispositive. Thus, we analyze whether Runyan had a possessory interest in the personal property searched, whether he exhibited a subjective expectation of privacy in that personal property, and whether he took normal precautions to maintain that expectation of privacy.

The parties do not dispute that Runyan had a possessory interest in the materials searched. While the record contains some disputed testimony regarding whether Judith or Runyan was the owner of the desktop computer, neither party contests that Runyan was the sole owner of both the storage containers retrieved from the barn and

the disks found near the desktop computer in the office, which were the subjects of the pre-warrant search at issue.

In addition, Runyan clearly exhibited a subjective expectation of privacy in both sets of materials in question. Runyan's placement of the non-electronic pornography in the duffel bag and the waterproof ammunition storage containers found in the barn evidences his subjective expectation of privacy in those materials. *See United States v. Villarreal*, 963 F.2d 770, 773 (5th Cir. 1992) ("Individuals can manifest legitimate expectations of privacy by placing items in closed, opaque containers that conceal their contents from plain view."). The government concedes that the disks found in the office near the computer are "containers" and that the standards governing closed container searches are applicable. Because neither party contests this point, we assume without deciding that computer disks are "containers." Accordingly, Runyan appears to have manifested his subjective expectation of privacy in the electronic images in question by storing the images in these "containers." Cf. *United States v. Barth*, 26 F. Supp. 2d 929, 936-37 (W.D. Tex. 1998) (finding that the owner of a computer manifested a reasonable expectation of privacy in the contents of data files by storing them on a computer hard drive); *United States v. Chan*, 830 F. Supp. 531, 534 (N.D. Cal. 1993) (analogizing data in a pager to contents of a closed container).

Finally, the record indicates that Runyan took normal precautions to maintain his privacy with respect to these materials. Runyan's efforts to secure the barn against intrusion by locking the barn door, putting a chain on the gate to the ranch, and installing video surveillance equipment at the ranch certainly qualify as normal precautions to maintain privacy. *See Vega*, 221 F.3d at 796 (indicating

that relevant factors when evaluating "normal precautions to maintain privacy" include whether the searched area is fenced or railed, whether the searched area was locked, and whether strangers were invited into the searched area).

Because application of the relevant *Cardoza-Hinojosa* factors indicates that Runyan had a protectable privacy interest in the materials that were the subject of the pre-warrant police examinations, those examinations are a series of "searches" within the meaning of the Fourth Amendment. However, this court has recognized that "a police view subsequent to a search conducted by private citizens does not constitute a 'search' within the meaning of the Fourth Amendment so long as the view is confined to the scope and product of the initial search." *United States v. Bomengo*, 580 F.2d 173, 175 (5th Cir. 1978); *see also United States v. Paige*, 136 F.3d 1012, 1019 (5th Cir. 1998). The government contends that the pre-warrant examinations at issue in the instant case were not "searches" because this "private search" doctrine applies.

The Supreme Court articulated the private search doctrine in *Walter v. United States*, 447 U.S. 649, 65 L. Ed. 2d 410, 100 S. Ct. 2395 (1980), and *United States v. Jacobsen*, 466 U.S. 109, 80 L. Ed. 2d 85, 104 S. Ct. 1652 (1984). In *Walter*, packages containing pornographic filmstrips were delivered to the wrong company. Employees of the company that erroneously received the shipment opened the packages and found film canisters. The content of each film was described on the exterior of its canister. The employees opened the canisters and one employee attempted to hold the films up to the light, but was unable to observe anything about the content of the films in this manner. *Walter*, 447 U.S. at 651. The recipients then

contacted federal agents, who viewed the films with a film projector without obtaining a warrant to search the contents of the packages. The sender was indicted on obscenity charges and filed a motion to suppress the films, arguing that the police had conducted a warrantless search of the package and that the exclusionary rule was therefore applicable. 447 U.S. at 652.

In upholding that claim, the Supreme Court produced no majority opinion.[10] The opinion announcing the judgment of the Court, authored by Justice Stevens and joined by Justice Stewart, held that the Fourth Amendment's protections apply to a government search conducted subsequent to a private search to the extent that the government's inquiry is more intrusive or extensive than the private search. 447 U.S. at 657. Prior to their projection of the films, the officers could only draw inferences regarding the content of the films based on the exterior descriptions. The opinion reasons that the official search significantly expanded on the private search by confirming the actual content of the films. *Id.* Put another way, when the private party unwrapped the containers to reveal the

[10] Justices Stevens and Stewart found that the officers had violated the Fourth Amendment because they exceeded the scope of the private search. Justices White and Brennan found that a Fourth Amendment violation had occurred regardless of whether the official search exceeded the scope of the private search. Justice Marshall completed the five justice majority in favor of suppression by concurring in the judgment while joining neither opinion. The four dissenters found that there was no legitimate expectation of privacy remaining in a package released to a common carrier when the addressee and the intended recipient were both using fictitious names and a private search had "clearly revealed the nature of the[ ] contents" of the package. *Walter*, 447 U.S. at 663 (Blackmun, J. dissenting).

labels on the canisters, the sender's expectation of privacy was frustrated in part, but not eliminated altogether. 447 U.S. at 659. The subsequent police determination of the content of the films was a warrantless "search" within the meaning of the Fourth Amendment because it breached the remaining, unfrustrated portion of the sender's expectation of privacy.

In *Jacobsen*, the Court confirmed the rationale of Justice Stevens's opinion in *Walter* and elaborated on what it means to "exceed the scope" of a private search. In that case, a Federal Express employee opened a damaged package and found several plastic bags of white powder inside a closed tube wrapped in crumpled newspaper. The employee put the bags back in the tube, put the tube and the newspapers back in the box, and then summoned federal authorities. The agent who responded to the employee's call opened the box, unpacked the bags of white powder and performed a chemical field test confirming that the white powder was cocaine. *Jacobsen*, 466 U.S. at 111-12. The addressees were subsequently convicted of possession of an illegal substance with intent to distribute. They argued that the results of the agent's warrantless search were subject to suppression. 466 U.S. at 112.

Adopting Justice Stevens's reasoning from *Walter* that "additional invasions of . . . privacy by the Government agent must be tested by the degree to which they exceed the scope of the private search," the Court found that the agent's actions did not violate the Fourth Amendment. 466 U.S. at 115. The Court determined that the agent's actions in removing the plastic bags from the tube and visually inspecting their content "enabled the agent to learn nothing that had not previously been learned during the private search." *Id.* at 120. The Court noted that "the

advantage the Government gained thereby was merely avoiding the risk of a flaw in the employees' recollection," and concluded that this confirmatory examination could not violate the Fourth Amendment because "protecting against the risk of misdescription hardly advances any legitimate privacy interest." 466 U.S. at 119.

In *Jacobsen*, the Court further noted that the field test performed by the agent could disclose only one fact previously unknown to the agent – whether or not the white powder was cocaine. The Court found that a chemical test that "merely discloses whether or not a particular substance is cocaine" does not compromise any legitimate interest in privacy. 466 U.S. at 123. Because Congress has decided that the interest in privately possessing cocaine is illegitimate, the Court reasoned that "governmental conduct that can reveal whether a substance is cocaine, and no other arguably 'private' fact, compromises no legitimate privacy interest." *Id.* The Court thus concluded that neither the visual inspection nor the field test could be a "search," because neither action infringed "any constitutionally protected privacy interest that had not already been frustrated as the result of private conduct." *Id.* at 126.

Runyan argues that the private search doctrine is inapplicable in the instant case because the police exceeded the scope of the private search. He maintains that the police's pre-warrant search of the disks exceeded the scope of the review conducted by Judith and Brandie in a number of ways.

First, Runyan notes that the police officers who examined the materials turned over by Judith looked at a greater number of disks than Judith and Brandie did.

Judith and Brandie examined only a randomly selected assortment of the floppy disks and CDs that they removed from the ranch, and they did not examine any of the ZIP disks. Agent Nuckles testified at the suppression hearing that he examined every one of the floppy disks, ZIP disks, and CDs that Judith turned over. In addition, Runyan argues that Agent Nuckles examined more images in reviewing each of these disks than did the private searchers.[11] Runyan further points out that, unlike the private searchers, the law enforcement officers printed out selected images and showed them to employees in the District Attorney's office in an attempt to identify an individual in one of the images.

While each of the distinctions between the private search and the police search pointed out by Runyan is supported by the record, it is unclear from this court's jurisprudence which of these distinctions are constitutionally relevant. Indeed, there is a remarkable dearth of federal jurisprudence elaborating on what types of investigative actions constitute "exceeding the scope" of a private search.[12]

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[11] It is unclear from the record whether the selected images from the disks that were introduced at trial were viewed by both the private searchers and the police searchers or whether these images were exclusively the product of the police's more expanded search. At least one ZIP disk was introduced at trial that the private searchers clearly could not have examined because they lacked the appropriate hardware.

[12] In the few instances where this court has had the opportunity to consider the applicability of the private search doctrine, we have either declined to reach the issue, *see*, e.g., *United States v. Grosenheider*, 200 F.3d 321, 327 (5th Cir. 2000), or our analysis has been limited to a conclusory statement that the police searchers did not exceed the scope

(Continued on following page)

Language from the Supreme Court's *Jacobsen* opinion suggests that the critical inquiry under the Fourth Amendment is whether the authorities obtained information with respect to which the defendant's expectation of privacy has not already been frustrated. Thus, *Jacobsen* directs courts to inquire whether the government learned something from the police search that it could not have learned from the private searcher's testimony and, if so, whether the defendant had a legitimate expectation of privacy in that information. *See Jacobsen*, 466 U.S. at 118-120. Since *Jacobsen*, the Court has not elaborated on the nature of the inquiry courts should use to determine whether a police search has exceeded the scope of a prior private search.

The decisions of our sister circuits similarly provide only limited guidance about the nature of this inquiry. Several courts of appeals have indicated that police exceed the scope of a prior private search when they examine objects or containers that the private searchers did not examine. *See*, e.g., *United States v. Rouse*, 148 F.3d 1040, 1041 (8th Cir. 1998); *United States v. Kinney*, 953 F.2d 863, 866 (4th Cir. 1992); *United States v. Donnes*, 947 F.2d 1430, 1434 (10th Cir. 1991). Far fewer courts have addressed the question whether police exceed the scope of a private search when they examine the same materials as private searchers but examine these materials more thoroughly or in a different manner. While the Supreme Court's distinction in *Walter* between the private searchers' actions in holding the filmstrips up to the light and the

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of the private search. *See*, e.g., *Paige*, 136 F.3d at 1020; *Bomengo*, 580 F.2d at 176.

police's actions in projecting the filmstrips suggests that the "thoroughness" of the police examination is a relevant factor, the one court of appeals to expressly consider this factor after *Walter* did not find such a difference in thoroughness to be dispositive. *See United States v. Simpson*, 904 F.2d 607, 610 (11th Cir. 1990) (finding that the F.B.I.'s search of a box containing pornographic videos and magazines "did not exceed the scope of the prior private searches for Fourth Amendment purposes simply because they took more time and were more thorough" than the private searchers).

Due to the lack of definitive guidance from the Supreme Court and the lack of consensus among our sister circuits regarding the precise nature of the evaluation required, we must tread carefully in our disposition of this issue. Today, we address only three narrow questions: (1) whether a police search exceeds the scope of a private search when private searchers examine selected items from a collection of similar closed containers and police searchers subsequently examine the entire collection; (2) whether a police search exceeds the scope of the private search when the police examine more items within a particular container than did the private searchers; and (3) whether a police search exceeds the scope of a private search when police searchers identify the subject of a photograph that the private searchers could not identify. Our review of the admittedly scarce jurisprudence indirectly addressing these inquiries leads us to conclude that the police have exceeded the scope of the private search in the instant case.

Initially, we address whether the police exceeded the scope of the private search when they examined the entire collection of "containers" (i.e., the disks) turned over by the

private searchers, rather than confining their search to the selected containers examined by the private searchers.[13] There are two lines of authority from other circuits that are instructive in addressing this question.

The Tenth Circuit and the Fourth Circuit have held that a police search exceeds the scope of a prior private search when the police open a container that the private searchers did not open. In *Donnes*, the defendant's landlord found a glove in the defendant's apartment containing a syringe and a camera lens case. Police officers subsequently opened the camera lens case without obtaining a warrant and discovered plastic bags containing methamphetamines. The Tenth Circuit held that the police searchers exceeded the scope of the private search by opening the camera lens case. The court reasoned that closed containers are subject to protection under the Fourth Amendment and that the police's lawful seizure of the glove did not compromise the defendant's expectation of privacy in the contents of the closed container found inside the box. Thus, the Fourth Amendment required the police to obtain a warrant before opening the container and inspecting its contents. *See Donnes*, 947 F.2d at 1436.

In *Kinney*, the defendant's girlfriend called the police when she found guns in his closet that she suspected were stolen. The police confiscated the guns from the closet and then opened a white canvas bag located in the same closet. They found various items of drug paraphernalia in the

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[13] We reiterate the caveat that we are assuming without deciding that the parties are correct in their characterization of computer storage devices as "closed containers."

bag. The Fourth Circuit held that the police exceeded the scope of the private search when they opened the canvas bag.[14] *See Kinney*, 953 F.2d at 866.

These cases, indicating that police exceed the scope of a prior private search when they open a container that the private searchers did not inspect, can be contrasted with the Eighth Circuit's holding in *United States v. Bowman*, 907 F.2d 63 (8th Cir. 1990). In *Bowman*, an airline employee opened an unclaimed suitcase and found five identical bundles wrapped in towels and clothing. The employee opened one bundle and found a white powdery substance wrapped in plastic and duct tape. He contacted a federal narcotics agent, who identified the exposed bundle as a kilo brick of cocaine and then opened the other bundles, which also contained kilo bricks of cocaine. The court held that the agent did not act improperly in failing to secure a warrant to unwrap the remaining identical bundles,[15] reasoning that the presence of the cocaine in the exposed bundle "'spoke volumes as to [the] contents [of the remaining bundles] – particularly to the trained eye of the officer.'" *Id.* at 65 (quoting *Jacobsen*, 466 U.S. at 121).

The Supreme Court's guidance in *Jacobsen* is useful in reconciling the apparent tension between the Eighth Circuit's approach in *Bowman* and the Tenth and Fourth

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[14] However, the court did not suppress the evidence. The court reasoned that the police were acting under a reasonable, albeit erroneous, belief that the defendant's girlfriend had authority to consent to the search. *See Kinney*, 953 F.2d at 866.

[15] We note that the Eighth Circuit in *Bowman* never determined whether the individually wrapped bundles were "containers" as that term has been used in the context of Fourth Amendment jurisprudence.

Circuits' ostensible conclusion in *Donnes* and *Kinney* that opening a new container is per se exceeding the scope of a prior private search. The *Jacobsen* Court emphasized that the police's actions in that case were unproblematic from a Fourth Amendment perspective because their actions "enabled . . . [them] to learn nothing that had not previously been learned during the private search." 466 U.S. at 120. Thus, under *Jacobsen*, confirmation of prior knowledge does not constitute exceeding the scope of a private search. In the context of a search involving a number of closed containers, this suggests that opening a container that was not opened by private searchers would not necessarily be problematic if the police knew with substantial certainty, based on the statements of the private searchers, their replication of the private search, and their expertise, what they would find inside. Such an "expansion" of the private search provides the police with no additional knowledge that they did not already obtain from the underlying private search and frustrates no expectation of privacy that has not already been frustrated.

This reading of *Jacobsen* harmonizes *Bowman* with *Kinney* and *Donnes*. Based on their inspection of the one bundle opened by the private searchers, their own expertise, and the apparent similarity of the bundles, the police in *Bowman* were substantially certain that the other four unopened bundles in the suitcase also contained kilos of cocaine. Thus, they did not exceed the scope of the private search in simply confirming this substantial certainty, despite the fact that they looked at additional containers (or additional items within a container) that the private searchers did not examine.

In contrast, in both *Kinney* and *Donnes* the police's opening of containers that the private searchers did not examine did not serve to confirm information of which they were already substantially certain. In *Kinney*, the police had no reason to believe that the duffel bag located in the same closet as the defendant's illegal weapons contained contraband. In opening the bag, they were not confirming the presence of illegal weapons or any other information that they obtained from the private searcher. Similarly, in *Donnes*, the police search of the camera case provided them with a piece of information – i.e., the defendant's possession of methamphetamines – that they could not have known based on the private search. There is no indication that the private search in *Donnes* made police aware that the defendant possessed methamphetamines. Thus, by opening the additional container, they were not simply confirming knowledge gained by private searchers.

The guideline that emerges from the above analysis is that the police exceed the scope of a prior private search when they examine a closed container that was not opened by the private searchers unless the police are already substantially certain of what is inside that container based on the statements of the private searchers, their replication of the private search, and their expertise. This guideline is sensible because it preserves the competing objectives underlying the Fourth Amendment's protections against warrantless police searches. A defendant's expectation of privacy with respect to a container unopened by the private searchers is preserved unless the defendant's expectation of privacy in the contents of the container has already been frustrated because the contents were rendered obvious by the private search. Moreover, this rule

discourages police from going on "fishing expeditions" by opening closed containers. Any evidence that police obtain from a closed container that was unopened by prior private searchers will be suppressed unless they can demonstrate to a reviewing court that an exception to the exclusionary rule is warranted because they were substantially certain of the contents of the container before they opened it.

Applying this guideline to the facts of the instant case reveals that the police's pre-warrant examination of the disks clearly exceeded the scope of the private search. The police could not have concluded with substantial certainty that all of the disks contained child pornography based on knowledge obtained from the private searchers, information in plain view, or their own expertise. There was nothing on the outside of any disk indicating its contents. Moreover, Judith's testimony at the suppression hearing reveals that she did not know the contents of the disks that she turned over, apart from the particular samples that she and Brandie had examined.[16] Indeed, she could not have known the contents of any of the ZIP disks, as she and Brandie did not use hardware capable of reading these disks in their private search. The mere fact that the disks that Judith and Brandie did not examine were found in the same location in Runyan's residence as the disks they did examine is insufficient to establish with substantial certainty that all of the storage media in question contained child pornography.

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[16] In fact, the record reveals that some of the CDs that Brandie brought back to Judith's Brownwood home did not actually contain child pornography and instead contained family photographs.

Thus, the police exceeded the scope of the private search in the instant case when they examined disks that the private searchers did not examine. Both these disks and any evidence obtained as a result of the information found on these disks are potentially subject to suppression. See Part II(2), infra.

Runyan further contends that the police exceeded the scope of the private search because they examined more files on each of the disks than did the private searchers. Initially, it is important to note that it is not clear from the record that this is true. Agent Nuckles testified that, while he did look at each of the storage devices turned over by Judith prior to obtaining a warrant, he only looked at two or three images on each of these disks. It is unnecessary for us to address this factual dispute, however, as we find that it would not have been constitutionally problematic for the police to have examined more files than did the private searchers. We agree with the Eleventh Circuit's position in Simpson that the police do not exceed the scope of a prior private search when they examine the same materials that were examined by the private searchers, but they examine these materials more thoroughly than did the private parties. *See Simpson*, 904 F.2d at 610. In the context of a closed container search, this means that the police do not exceed the private search when they examine more items within a closed container than did the private searchers. Though the Supreme Court has long recognized that individuals have an expectation of privacy in closed containers, *see*, e.g., *Smith v. Ohio*, 494 U.S. 541, 542, 108 L. Ed. 2d 464, 110 S. Ct. 1288 (1990) (per curiam); *United States v. Ross*, 456 U.S. 798, 822, 72 L. Ed. 2d 572, 102 S. Ct. 2157, (1982), an individual's expectation of privacy in the contents of a container has

already been compromised if that container was opened and examined by private searchers, *see*, e.g., *Jacobsen*, 466 U.S. at 119. Thus, the police do not engage in a new "search" for Fourth Amendment purposes each time they examine a particular item found within the container.

In so holding, we reject the reasoning espoused by the Eighth Circuit in *Rouse*, where that court held that the police exceeded the scope of a private search when they found and examined more items within an airline passenger's bag than the airline employees had found in their prior private search. *Rouse*, 148 F.3d at 1041. We adopt the logic of *Simpson* over that of *Rouse* based on our determination that *Rouse* is inconsistent with the objectives underlying the warrant requirement and the exclusionary rule. Under the reasoning of *Rouse*, police would exceed the scope of a private investigation and commit a warrantless "search" in violation of the Fourth Amendment each time they happened to find an item within a container that the private searchers did not happen to find. Police would thus be disinclined to examine even containers that had already been opened and examined by private parties for fear of coming across important evidence that the private searchers did not happen to see and that would then be subject to suppression. The *Rouse* approach would over-deter the police, preventing them from engaging in lawful investigation of containers where any reasonable expectation of privacy has already been eroded. This approach might also lead police to waste valuable time and resources obtaining warrants based on intentionally false or mistaken testimony of private searchers, for fear that, in confirming the private testimony before obtaining a warrant, they would inadvertently violate the Fourth Amendment if they happened

upon additional contraband that the private searchers did not see.

Because we find that the police do not exceed the scope of a prior private search when they examine particular items within a container that were not examined by the private searchers, we accordingly determine that the police in the instant case did not exceed the scope of the private search if they examined more files on the privately-searched disks than Judith and Brandie had. Suppression of any such files is therefore unnecessary.

Finally, Runyan contends that the police exceeded the scope of the private search when they printed out the images of Misty that they had found on the computer and showed these images to employees at the District Attorney's office in an attempt to identify her. He contends that Misty's testimony should thus be suppressed because it is the "fruit of the poisonous tree,' i.e., because Misty's identification was derived from the police's illegal conduct in exceeding the scope of the private search. We find it unnecessary to decide today whether a police search exceeds the scope of a private search when police searchers identify the subject of a photograph that the private searchers could not identify.

There is significant factual dispute in the record regarding whether Melissa Payne, the intern in the District Attorney's office, positively identified Misty via printouts of the computerized images or via the Polaroid photographs that Judith found in the duffel bag from Runyan's barn. Payne testified at the suppression hearing (and the government maintains) that she identified Misty via the Polaroids. Because we must interpret these facts in the light most favorable to the government, we must

assume that the actual positive identification came from photographs, not the computer printouts. *See*, e.g., *United States v. Maldonado*, 735 F.2d 809, 814 (5th Cir. 1984) ("In reviewing a trial court's ruling on a motion to suppress . . . the evidence must be viewed in the light most favorable to the party prevailing below, except where such a view is either not consistent with the trial court's findings or is clearly erroneous considering the evidence as a whole."). Thus, because we find that Misty's testimony stemmed from evidence (i.e., the Polaroids) that was clearly within the scope of the private search and not the product of illegal police activity, we need not consider whether the act of printing out and circulating the computer images of Misty exceeded the scope of the private search.

2. Is the Exclusionary Rule Applicable?

The exclusionary rule prohibits introduction at trial of evidence obtained as the result of an illegal search or seizure. The rule excludes not only the illegally obtained evidence itself, but also other incriminating evidence derived from that primary evidence. *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 64 L. Ed. 319, 40 S. Ct. 182 (1920). In *Wong Sun v. United States*, 371 U.S. 471, 488, 9 L. Ed. 2d 441, 83 S. Ct. 407 (1963), the Supreme Court further extended the exclusionary rule to encompass evidence that is the indirect product or "fruit" of unlawful police conduct. Thus, in the instant case, any "fruits" of the portion of the police search that exceeded the scope of the private search – including any disks that the private searchers did not examine but were viewed by the police

prior to the issuance of the warrant – should have been excluded at trial.[17]

However, evidence that is otherwise suppressible under the exclusionary rule is admissible if the connection between the alleged illegality and the acquisition of the evidence is so attenuated as to dissipate the "taint" of the unlawful police activity. *See Nardone v. United States*, 308 U.S. 338, 341, 84 L. Ed. 307, 60 S. Ct. 266 (1939). In applying this principle, the Court has crafted a number of exceptions to the exclusionary rule. These exceptions are designed to ensure that the exclusionary rule puts police "in the same, not a worse position than they would have been in if no police error or misconduct had occurred." *Nix v. Williams*, 467 U.S. 431, 443, 81 L. Ed. 2d 377, 104 S. Ct. 2501 (1984) (emphasis in original).

In *United States v. Miller*, 666 F.2d 991, 995 (5th Cir. 1982), this court outlined the three primary exceptions to the exclusionary rule. Evidence will be admissible despite the exclusionary rule if: (1) it "derives from an independent source," (2) it "has an attenuated link to the illegally secured evidence," or (3) it "inevitably would have been discovered during police investigation without the aid of the illegally obtained evidence." *Id.* (internal citations omitted).

The government argues that the "independent source" exception to the exclusionary rule is applicable in the

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[17] It should be noted that there is no way of knowing which disks were examined by the private searchers. Thus, if suppression is deemed appropriate, this uncertainty will necessitate suppression of all the disks.

instant case. The government's position is that the magistrate judge's decision to issue a warrant permitting police to search the computer and the disks was independent of the pre-warrant searches – the same warrant would have been issued even if the police had never conducted a pre-warrant search of the storage media because the information that the police obtained from Judith's testimony, Runyan's admissions to the police, and Misty's testimony was sufficient to support the warrant. The government maintains that, because the police could have obtained all the information that they acquired through their pre-warrant search of the disks during their subsequent searches pursuant to the warrant, these subsequent, lawful searches were an "independent source," and the information is therefore admissible at trial.

The "independent source" exception to the exclusionary rule was outlined by the Supreme Court in *Murray v. United States*, 487 U.S. 533, 101 L. Ed. 2d 472, 108 S. Ct. 2529 (1987). In that case, the Court considered whether marijuana that was observed by police in plain view at the time of an unlawful entry and that was later seized during a subsequent search pursuant to a warrant was admissible evidence. The Court first clarified that the independent source rule applies not only to evidence obtained for the first time during an independent lawful search, but also to evidence initially discovered during or as a consequence of an unlawful search but later obtained independently from activities untainted by the initial illegality. *Id.* at 537-38. The Court held that, in order for a later search pursuant to a warrant to be deemed "genuinely independent" of a prior illegal entry, the government must demonstrate two things: (1) that the police would still have sought a warrant in the absence of the illegal search; and (2) that the

magistrate judge would still have issued the warrant had the supporting affidavit not contained information stemming from the illegal search. 487 U.S. at 542. Because the district court made no specific factual findings addressing whether the police would have sought a warrant in the absence of their prior illegal entry, the Court remanded the case for an explicit finding on this issue.

Thus, in order to avoid suppression of any images on the disks that were not examined by the private searchers, the government must demonstrate that it would have both sought and obtained a warrant even if the police had never exceeded the scope of the private search. In *Murray*, the Supreme Court indicated that the district court's finding that the agents did not reveal their prior warrantless entry to the magistrate judge in the warrant application was sufficient to demonstrate that the police would have obtained a warrant in the absence of the illegal search. *Murray*, 487 U.S. at 543. In the instant case, however, one of the affidavits submitted by Agent Nuckles in support of the warrant applications refers to his pre-warrant search of the computer storage devices, indicating that Nuckles conducted a "cursory" review of the materials prior to his application.[18] The inclusion of this statement raises a

[18] Admittedly, this information about Agent Nuckles's pre-warrant search activities was contained in the affidavit underlying the warrant application for Runyan's ranch house rather than the affidavit underlying the warrant application for Runyan's computer and disks. However, given that these affidavits were submitted at the same time and were virtually identical in all other respects, we cannot definitively establish (as the Court in *Murray* could) that these statements regarding Nuckles's pre-warrant search activities played no role in the magistrate judge's decision to issue the warrant for Runyan's computer and disks.

question about whether and to what extent the magistrate judge relied on this statement in issuing the warrants. The district court made no factual findings at the suppression hearing addressing this issue.

Similarly, the district court made no specific factual findings at the suppression hearing indicating whether the police would have sought the warrants if they had not previously exceeded the scope of the private search. As such factual determinations are clearly within the province of the district court, a remand to that court is required.

We retain jurisdiction over these appeals and make a limited remand in No. 00-10821 to the district court to conduct such proceedings as are necessary to make findings of fact addressing: (1) whether the police would have sought the warrants had the police never exceeded the scope of the private search; and (2) whether the magistrate judge would have issued the warrants had one of the supporting affidavits not contained a reference to the illegal pre-warrant search activities. Both parties may develop evidence relating to these inquiries. *See United States v. Parker*, 722 F.2d 179, 185 (5th Cir. 1983) (ordering a similar limited remand), overruled on other grounds sub nom., *United States v. Hurtado*, 905 F.2d 74, 75-76 (5th Cir. 1990) (en banc).

The clerk of this court is directed to return the record in No. 00-10821 to the district court. Within forty-five days after entry of this remand, the district court shall provide a supplemental order setting forth its factual findings. Once the district court's supplemental order is entered, the clerk of the district court shall return the record, as supplemented, to this court for disposition of these appeals

by this panel. The parties may then file supplemental letter briefs addressing the findings contained in the district court's supplemental order on an expedited basis to be established by the clerk of this court.

We do not reach the other issues raised in these appeals at this time.

III. Conclusion

For the foregoing reasons, we retain jurisdiction over these appeals and REMAND No. 00-10821 to the district court on a limited basis for proceedings consistent with this opinion.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 00-10821

Consolidated with Case No. 01-11207

UNITED STATES OF AMERICA

Plaintiff-Appellee

v.

ROBERT BEAM RUNYAN

Defendant-Appellant

Appeals from the United States District Court for the Northern District of Texas, San Angelo

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ON PETITION FOR REHEARING

(Filed May 17, 2002)

Before KING, Chief Judge, and JOLLY and BENAVIDES, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is DENIED.

ENTERED FOR THE COURT:

/s/ Carolyn Dineen King
United States Circuit Judge